TEXAS REGISTER

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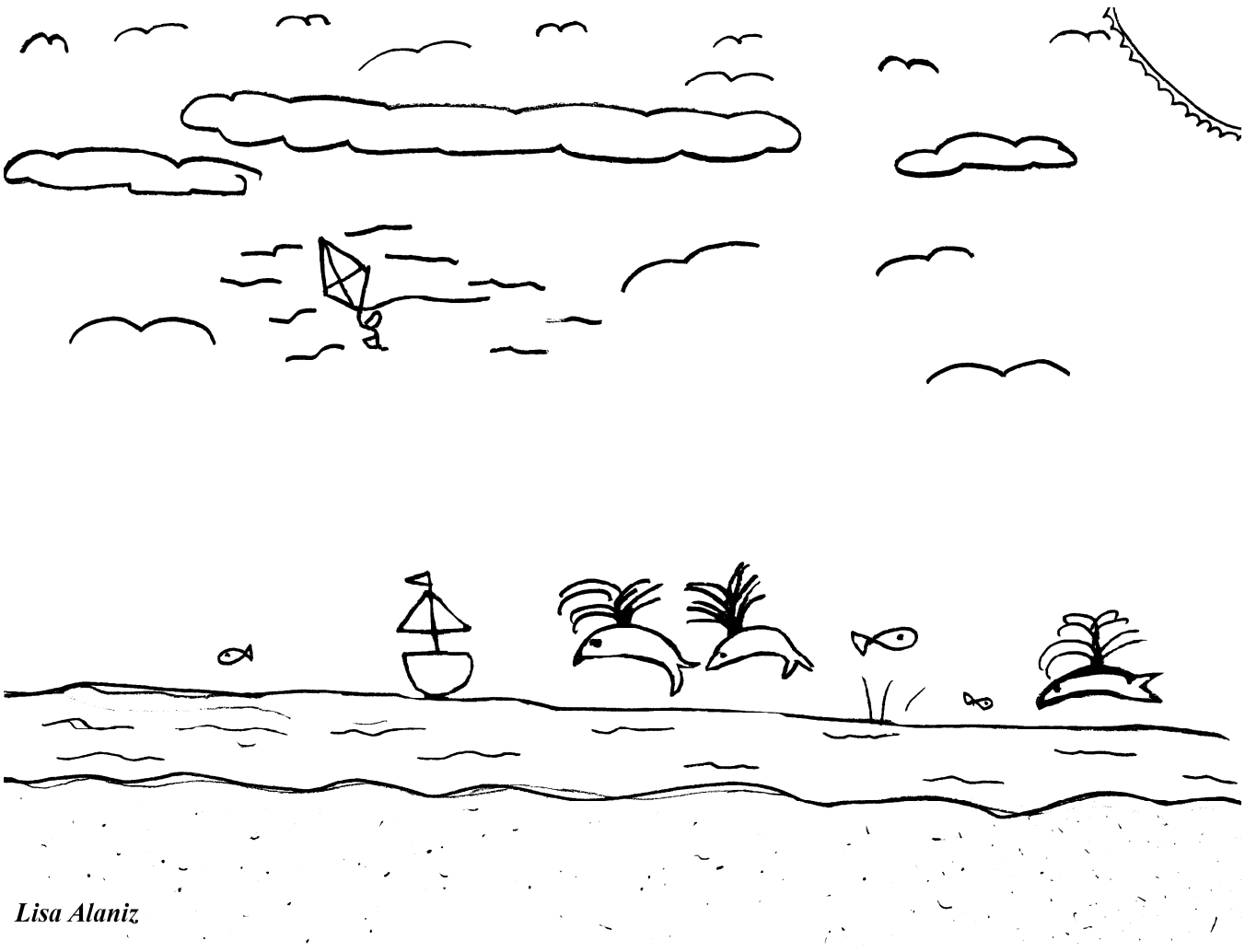

Lisa Alaniz

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 463-5561 in Austin. For out-of-town callers our toll-free number is 800-226-7199. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/opinopen/opengovt.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.state.tx.us/

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for July 3, 2008

Appointed to the Texas Health Services Authority, pursuant to House Bill 1066, 80th Legislature, Regular Session, for a term to expire June 15, 2009, Alesha Adamson of San Antonio.

Appointed to the Texas Health Services Authority, pursuant to House Bill 1066, 80th Legislature, Regular Session, for a term to expire June 15, 2009, Fred Buckwold of Houston.

Appointed to the Texas Health Services Authority, pursuant to House Bill 1066, 80th Legislature, Regular Session, for a term to expire June 15, 2009, Raymond F. Davis of El Paso.

Appointed to the Texas Health Services Authority, pursuant to House Bill 1066, 80th Legislature, Regular Session, for a term to expire June 15, 2009, David C. Fleeger of Austin.

Appointed to the Texas Health Services Authority, pursuant to House Bill 1066, 80th Legislature, Regular Session, for a term to expire June 15, 2009, Matthew J. Hamlin of Argyle.

Appointed to the Texas Health Services Authority, pursuant to House Bill 1066, 80th Legislature, Regular Session, for a term to expire June 15, 2009, Edward W. Marx of Euless.

Appointed to the Texas Health Services Authority, pursuant to House Bill 1066, 80th Legislature, Regular Session, for a term to expire June 15, 2009, Kathleen K. Mechler of Fredericksburg.

Appointed to the Texas Health Services Authority, pursuant to House Bill 1066, 80th Legislature, Regular Session, for a term to expire June 15, 2009, J. Darren Rodgers of Dallas.

Appointed to the Texas Health Services Authority, pursuant to House Bill 1066, 80th Legislature, Regular Session, for a term to expire June 15, 2009, Stephen Yurco of Austin.

Appointed to the Texas Health Services Authority, pursuant to House Bill 1066, 80th Legislature, Regular Session, for a term to expire June 15, 2009, Manfred Sternberg of Houston. Mr. Sternberg will serve as Presiding Officer of the authority.

Appointed as Ex-Officio member to the Texas Health Services Authority, Dee F. Porter of Austin.

Appointed as Ex-Officio member to the Texas Health Services Authority, Luanne Southern of Austin.

Appointments for July 7, 2008

Appointed to the State Community Development Review Committee for a term to expire February 1, 2009, Julie Masters of Dickinson (replacing Sue Langley of Aledo whose term expired).

Appointed to the Commission on Uniform State Laws, effective October 1, 2008, for a term to expire September 30, 2014, Peter K. Munson of Pottsboro (Mr. Munson is being reappointed).

Appointed to the Commission on Uniform State Laws, effective October 1, 2008, for a term to expire September 30, 2014, Rodney W. Satterwhite of Midland (Mr. Satterwhite is being reappointed).

Appointed to the Commission on Uniform State Laws, effective October 1, 2008, for a term to expire September 30, 2014, Karen Roberts Washington of Dallas (Ms. Washington is being reappointed).

Appointed to the Trinity River Authority Board of Directors for a term to expire March 15, 2013, David Leonard of Liberty (replacing Connie Arnold of Liberty whose term expired).

Appointments for July 11, 2008

Appointed to the Texas Board of Professional Engineers for a term to expire September 26, 2011, Govind Nadkarni of Corpus Christi (Mr. Nadkarni is being reappointed).

Appointed to the Texas Board of Professional Engineers for a term to expire September 26, 2013, Daniel Wong of Sugar Land (Mr. Wong is being reappointed).

Appointed to the Texas Board of Professional Engineers for a term to expire September 26, 2013, Gary Raba of San Antonio (replacing Gerry Pate of Magnolia whose term expired).

Designating George Kemble Bennett of College Station as Presiding Officer of the Texas Board of Professional Engineers for a term at the pleasure of the Governor. Mr. Bennett is replacing Govind Nadkarni of Corpus Christi as presiding officer.

Appointed to the Chronic Kidney Disease Task Force for a term to expire at the pleasure of the Governor, Charles R. Nolan of San Antonio.

Appointed to the Board of Pilot Commissioners for Galveston County for a term to expire February 1, 2012, Sally H. Prill of Galveston (replacing Elizabeth A. Iles of Texas City whose term expired).

Appointed to the Board of Pilot Commissioners for Galveston County for a term to expire February 1, 2012, Vandy Anderson of Galveston (Mr. Anderson is being reappointed).

Designating Frederick Liles Arnold of Plano as Presiding Officer of the Council on Sex Offender Treatment for a term at the pleasure of the Governor. Mr. Arnold is replacing Walter J. Meyer III of Galveston as presiding officer.

Appointments for July 14, 2008

Appointed to the Texas State Board of Social Workers Examiners for a term to expire February 1, 2013, Candace Guillen of La Feria (replacing Jeannie McGuire of College Station whose term expired).

Designating Timothy Brown of Bryan as Presiding Officer of the Texas State Board of Social Worker Examiners for a term at the pleasure of the Governor. Mr. Brown is replacing Jeannie McGuire of College Station as presiding officer.

Rick Perry, Governor

TRD-200803623

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THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Opinions

Opinion No. GA-0642

The Honorable James L. Anderson, Jr.

Aransas County Attorney

301 North Live Oak Street

Rockport, Texas 78382

Re: Whether the creation of a county court at law and the related divestiture of the constitutional county court's probate, juvenile, civil, and criminal jurisdiction stripped a county judge of his powers as "magistrate" (RQ-0669-GA)

S U M M A R Y

The county judge of the Aransas County Court ("Court"), a constitutional court, retains the power to act as a magistrate despite the fact that the Court was divested of its probate, juvenile, civil, and criminal jurisdiction.

Opinion No. GA-0643

The Honorable Chris G. Taylor

Tom Green County Attorney

122 West Harris Avenue

San Angelo, Texas 76903

Re: Whether the conduct of a constable implicates the resign-to-run provisions of article XVI, section 65 of the Texas Constitution (RQ-0665-GA)

S U M M A R Y

Election Code section 251.001(1)(A) provides that the filing of a campaign treasurer appointment does not constitute candidacy or an announcement of candidacy for another elected office for the purposes of the automatic resignation provisions of Texas Constitution article XVI, section 65. A court would likely conclude that section 251.001(1)(A) is constitutional.

Because the facts presented are not legally dispositive as to whether a particular constable orally or in writing stated that he was a candidate or running for the office of county commissioner, this office cannot determine as a matter of law that the constable announced his candidacy for another office when more than one year remained in his current term of office.

Opinion No. GA-0644

The Honorable Kim Brimer

Chair, Committee on Administration

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Whether, under section 70.001 of the Texas Property Code, an auto repair shop may assert a mechanic's lien for administrative and overhead charges when the shop does not repair the vehicle (RQ-0667-GA)

S U M M A R Y

Section 70.001(a) of the Texas Property Code authorizes only a worker "who by labor repairs" a vehicle to possess the vehicle until the worker is compensated for the repairs. TEX. PROP. CODE ANN. § 70.001(a) (Vernon 2007). If an auto repair shop does not perform any repairs on a vehicle, it may not assert a lien under section 70.001(a).

Opinion No. GA-0645

Mr. Sidney "Buck" LaQuey

Grimes County Auditor

Post Office Box 510

Anderson, Texas 77830

Re: Whether a county commissioner may be paid while working for the county sheriff in the jail division (RQ-0661-GA)

S U M M A R Y

Local Government Code section 81.002(a) precludes a county commissioner from being paid for employment in the county sheriff's department.

Opinion No. GA-0646

The Honorable Laurie K. English

112th Judicial District Attorney

400 South Nelson

Fort Stockton, Texas 79735

Re: Meaning of the term "previously captured" for purposes of section 42.092 of the Penal Code, which prohibits cruelty to nonlivestock animals (RQ-0666-GA)

S U M M A R Y

Section 42.092 of the Penal Code defines "animal" to include any wild living creature "previously captured." Under the facts described, a wild living creature has been previously captured if it has been confined against its will at some time prior to the act of inflicting torture, death, or serious bodily injury to the creature.

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200803638
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: July 16, 2008

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EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034). An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days. (Government Code, §2001.034).

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES AND NOXIOUS AND INVASIVE PLANTS

SUBCHAPTER V. MEXICAN FRUIT FLY QUARANTINE

4 TAC §§19.500 - 19.508

The Texas Department of Agriculture is renewing the effectiveness of the emergency adoption of new §§19.500 - 19.508, for a 60-day period. The text of the new sections was originally published in the April 18, 2008, issue of the *Texas Register* (33 TexReg 3090).

Filed with the Office of the Secretary of State on July 10, 2008.

TRD-200803542
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Original Effective Date: April 4, 2008
Expiration Date: September 21, 2008
For further information, please call: (512) 463-4075

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SUBCHAPTER W. RED PALM MITE QUARANTINE

4 TAC §§19.600 - 19.603

The Texas Department of Agriculture (the department) adopts on an emergency basis new Chapter 19, Subchapter W, §§19.600 - 19.603, concerning a quarantine for the red palm mite, *Raoiella indica* Hirst. The new sections are adopted on an emergency basis to prevent introduction of red palm mite into Texas. The red palm mite was first detected in the continental United States on December 3, 2007, in Palm Beach County, Florida. Since then, the mite has spread to three additional Florida counties. As of June 17, 2008, it was detected in 107 residential properties and two nurseries in Florida. To ensure only mite-free palms are shipped into Texas, the new sections require the Florida Department of Agriculture and Consumer Services, Division of Plant Industry (DPI) to inspect the red palm mite host plants before shipment and provide mite-free phytosanitary certification. Alternatively, nurseries can enter into a compliance agreement with the DPI to follow a prescribed treatment plan and ship plants using a stamp.

The red palm mite is about 1/100th of an inch in length, bright red, and is barely visible with the naked eye. It feeds on leaves of 32 species of palms, bananas, gingers, etc. and causes localized yellowing of leaves followed by tissue death. Heavy infestation can cause significant loss of the foliage. The mite is not known to occur in Texas and it poses a serious threat to the state's palm nurseries and to residential properties, shopping malls, businesses, and other areas where palms are used for landscaping. Although DPI is encouraging nurseries handling the mite host plants to enter into the DPI-established compliance agreement, there is no assurance all nurseries will do so. Furthermore, the quarantine would also deter residents and tourists from transporting the mite-infested host plants from infested to non-infested areas. Inspection of plants by DPI prior to shipment, or shipment of plants under the compliance agreement provision, would ensure shipments to be free of the mites. For these reasons, the department believes adoption of a quarantine on an emergency basis, is both necessary and appropriate. The emergency quarantine takes necessary steps to prevent the artificial introduction of the red palm mite into Texas.

New §19.600 defines the quarantined pest. New §19.601 designates the infested areas subjected to the quarantine. New §19.602 lists the articles subject to the quarantine. New §19.603 prescribes requirements for movement of the quarantined articles from the quarantined area to Texas. An emergency rule adopted under §2001.034 may be effective for not longer than 120 days and may be renewed for not longer than 60 days. Nevertheless, the department intends to propose adoption of this emergency rule on a permanent basis in a separate submission.

The new sections are adopted on an emergency basis under the Texas Agriculture Code, §71.001 and §71.002, which authorize the department to establish quarantines against in-state and out-of-state diseases and pests, §71.004, which authorizes the department to establish emergency quarantines; §71.007 which authorizes the department to adopt rules as necessary to protect agricultural and horticultural interests, including rules to provide for specific treatment of quarantined articles; and the Texas Government Code §2001.034, which provides for the adoption of administrative rules on an emergency basis, without notice and comment.

§19.600. Quarantined Pest.

The quarantined pest is the red palm mite, *Raoiella indica* Hirst in any living stage of development.

§19.601. Quarantined areas.

The quarantined areas are:

(1) Broward, Dade, Monroe and Palm Beach counties in the State of Florida; and

(2) any other area infested with the red palm mite.

§19.602. Quarantined Articles.

(a) The quarantined pest is a quarantined article.

(b) The following articles are quarantined:
Figure: 4 TAC §19.602(b)

§19.603. Restrictions.

(a) General. Quarantined articles originating from quarantined areas are prohibited entry into Texas, except as provided in subsection (b) of this section.

(b) Exceptions. Quarantined articles from quarantined areas are allowed entry into Texas if:

(1) accompanied by a phytosanitary certificate issued by an authorized inspector of the state of origin certifying that the article was inspected within 14 days of the shipment and is free of the quarantined pest; or

(2) accompanied by a stamp issued by an authorized representative of the state of origin certifying that the article was produced at a nursery which has entered into a compliance agreement with the state of origin to treat and handle the quarantined article as prescribed by the department and the article is free of the quarantined pest.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 8, 2008.

TRD-200803502
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective Date: July 8, 2008
Expiration Date: November 4, 2008
For further information, please call: (512) 463-4075

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 20. COTTON PEST CONTROL

SUBCHAPTER C. STALK DESTRUCTION PROGRAM

4 TAC §20.22

The Texas Department of Agriculture (the department) proposes an amendment to §20.22, concerning stalk destruction deadlines. The amendment is proposed to modify the destruction deadline date for Pest Management Zone 2, Area 3. The proposed amendment changes the destruction deadline date from September 1 to September 15. The amendment to §20.22 is proposed in response to a request from the Cotton Producer Advisory Committee of Pest Management Zone 2. The proposed amendment promotes suppression of boll weevil populations by reflecting needs of cotton producers in that area.

Dr. Robert Crocker, coordinator for pest management and citrus, has determined that for the first five-year period the proposed amendment is in effect, there will be no anticipated fiscal impact for state and local governments as a result of administering or enforcing the amended rule, as proposed.

Dr. Crocker also has determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of administering and enforcing the section will be increased regulatory efficiency and increased suppression of overwintering populations of boll weevils and pink bollworms in Pest Management Zone 3. No cost is anticipated for micro-businesses, small businesses or individuals required to comply with the amendments.

The amendment to §20.22 is proposed in accordance with the Texas Agriculture Code (the Code), §74.006 which provides the department with the authority to adopt rules as necessary for the effective enforcement and administration of Chapter 74; and the Code, §74.004 which provides the department with the authority to establish regulated areas, dates and appropriate methods of destruction of stalks, other cotton parts and products of host plants for cotton pests.

The code affected by the proposal is the Texas Agriculture Code, Chapter 74.

§20.22. Stalk Destruction Requirements.

(a) Deadlines and methods. All cotton plants in pest management zones 1-8 shall be rendered non-hostable by the stalk destruction dates indicated for the zone. Destruction shall be performed periodically to prevent the presence of fruiting structures. Destruction of all cotton plants shall be accomplished in Zone 9 by shredding and in Zone 10 by shredding and plowing. In Zone 9, destruction shall be performed as necessary to keep cotton non-hostable. In Zone 10, soil must be tilled to a depth of 6 or more inches and destruction shall be performed as necessary to prevent regrowth and volunteer cotton.
Figure: 4 TAC §20.22(a)

(b) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 10, 2008.

TRD-200803539
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: August 24, 2008
For further information, please call: (512) 463-4075

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 5. COMMUNITY SERVICES PROGRAMS

SUBCHAPTER A. COMMUNITY SERVICES BLOCK GRANT (CSBG)

10 TAC §5.6

The Texas Department of Housing and Community Affairs (the Department) proposes amendments to 10 TAC §5.6, concerning Distribution of CSBG Funds. The revised section is proposed to address the use of administrative funds and discretionary funds.

Mr. Michael Gerber, Executive Director, has determined that there will be no fiscal implications for the state and local government as a result of enforcing or administering the amended section.

Mr. Gerber has also determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the section will be to make available unexpended CSBG administrative funds for purposes outlined in §5.6(c) and (d). There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted in writing to Mr. Al Almaguer, Manager, Community Services Section, Texas Department of Housing and Community Affairs, Post Office Box 13941, Austin, Texas 78711-3941, within twenty-one days of this notice.

These amended sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306.

No other code, articles or statutes are affected by these sections.

§5.6. Distribution of CSBG Funds.

(a) - (b) (No change.)

(c) Any funds not expended under subsection (a) or (d) of this section may be expended for activities that may include: the provision of training and technical assistance to CSBG eligible entities, [~~Five percent (5%) of the Department's annual allocation of CSBG funds may be used for activities that may include:~~] services to low-income Migrant Seasonal Farmworker and Native American populations; to assist CSBG eligible entities in responding to natural or man-made disasters. The Department also considers proposals that request funding for innovative and demonstration projects that assist CSBG target population groups to overcome at least one of the barriers to attaining self-sufficiency. A portion of these funds are used to confer Performance Awards to eligible entities that transition persons out of poverty.

(d) Up to five percent (5%) of the Department's annual allocation of CSBG funds will be used for administrative purposes consistent with state and federal law. [~~Five percent (5%) of the Department's annual CSBG allocation is used to cover state administrative costs including salary and benefits for state CSBG staff, indirect costs, a portion of operating costs (space, telephone, staff travel, etc.), and capital expenditures (furnishings, equipment, etc.).~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 8, 2008.

TRD-200803508
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: August 24, 2008
For further information, please call: (512) 475-3916

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 97. PLANNING AND ACCOUNTABILITY

SUBCHAPTER AA. ACCOUNTABILITY AND PERFORMANCE MONITORING

19 TAC §97.1004

(Editor's note: In accordance with Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 19 TAC §97.1004 is not included in the print version of the Texas Register. The figure is available in the on-line version of the July 25, 2008, issue of the Texas Register.)

The Texas Education Agency proposes an amendment to §97.1004, concerning adequate yearly progress (AYP). The section establishes provisions related to AYP and sets forth the process for evaluating campus and district AYP status. The section also adopts the most recently published AYP guide. The proposed amendment would adopt applicable excerpts, *Sections II-V*, of the *2008 Adequate Yearly Progress Guide*.

Under the accountability provisions in the federal No Child Left Behind Act, all public school campuses, school districts, and the state are evaluated for AYP. Districts, campuses, and the state are required to meet AYP criteria on three measures: reading/English language arts, mathematics, and either graduation rate (for high schools and districts) or attendance rate (for elementary and middle/junior high schools). If a campus, district, or state receiving Title I, Part A funds fails to meet AYP for two consecutive years, that campus, district, or state is subject to certain requirements such as offering supplemental educational services, offering school choice, or taking corrective actions. To implement these requirements, the agency developed the AYP guide.

Agency legal counsel has determined that the commissioner of education should take formal rulemaking action to place into the *Texas Administrative Code* procedures related to AYP. Through 19 TAC §97.1004, adopted effective July 14, 2005, the commissioner exercised rulemaking authority to establish provisions related to AYP and set forth the process for evaluating campus and district AYP status. Portions of each AYP guide have been adopted beginning with the 2004 AYP Guide, and the intent is to annually update 19 TAC §97.1004 to refer to the most recently published AYP guide.

The proposed amendment to 19 TAC §97.1004 would update the rule to adopt applicable excerpts, *Sections II-V*, of the *2008 Adequate Yearly Progress Guide*. These excerpted sections describe specific features of the system, AYP measures and standards, and appeals. In 2008, the U.S. Department of Education (USDE) approved changes to specific components of the AYP system, including the areas addressed in the applicable excerpts of the 2008 AYP Guide. Examples of approved changes include approval of timeline for delayed release of preliminary AYP results, use of the TAKS-Modified test for assessing special education students on modified academic achievement standards, change to the federal cap process, clarification of Safe Harbor requirements, and the expiration of the November 30, 2005, flexibility agreement between Texas and USDE related to inclusion of students with disabilities in the calculation of AYP.

In addition, subsection (d) would be modified to specify that the AYP guide adopted for the school years prior to 2008-2009 will remain in effect with respect to those school years.

The proposed amendment would establish in rule the specific AYP procedures for 2008. Applicable procedures would be adopted each year as annual versions of the AYP guide are published.

Criss Cloudt, Associate Commissioner for Assessment, Accountability, and Data Quality, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Dr. Cloudt has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be to continue to inform the public of the AYP rating procedures for public schools

by including this rule in the *Texas Administrative Code*. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins July 25, 2008, and ends August 25, 2008. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register* on July 25, 2008.

The amendment is proposed under the Texas Education Code (TEC), §7.055(b)(32), which authorizes the commissioner to perform duties in connection with the public school accountability system as prescribed by TEC, Chapter 39; TEC, §39.073, which authorizes the commissioner to determine how all indicators adopted under TEC, §39.051(b), may be used to determine accountability ratings; and TEC, §39.075(a)(4), which authorizes the commissioner to conduct special accreditation investigations in response to state and federal program requirements.

The amendment implements the Texas Education Code, §§7.055(b)(32), 39.073, and 39.051(b).

§97.1004. Adequate Yearly Progress.

(a) In accordance with the federal No Child Left Behind Act and Texas Education Code, §§7.055(b)(32), 39.073, and 39.075, all public school campuses, school districts, and the state are evaluated for Adequate Yearly Progress (AYP). Districts, campuses, and the state are required to meet AYP criteria on three measures: reading/English language arts, mathematics, and either graduation rate (for high schools and districts) or attendance rate (for elementary and middle/junior high schools). The performance of a school district, campus, or the state is reported through indicators of AYP status established by the commissioner of education.

(b) The determination of AYP for school districts and charter schools in 2008 [~~2007~~] is based on specific criteria and calculations, which are described in excerpted sections of the 2008 [~~2007~~] AYP Guide provided in this subsection.
Figure: 19 TAC §97.1004(b)
[~~Figure: 19 TAC §97.1004(b)~~]

(c) The specific criteria and calculations used in AYP are established annually by the commissioner of education and communicated to all school districts and charter schools.

(d) The specific criteria and calculations used in the AYP guide adopted for the school years prior to 2008-2009 [~~2007-2008~~] remain in effect for all purposes, including accountability, data standards, and audits, with respect to those school years.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 14, 2008.

TRD-200803583

Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: August 24, 2008
For further information, please call: (512) 475-1497

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CHAPTER 103. HEALTH AND SAFETY SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING SAFE SCHOOLS

19 TAC §103.1201

The Texas Education Agency (TEA) proposes new §103.1201, concerning standards for operation of school district disciplinary alternative education programs (DAEPs). The proposed new rule would adopt minimum standards for the program in accordance with the Texas Education Code (TEC), §37.008.

House Bill (HB) 426, 80th Texas Legislature, 2007, amended the TEC, §37.008, adding requirements for school districts with DAEPs to employ only teachers who meet all certification requirements established under the TEC, Chapter 21, Subchapter B, and to provide not less than the minimum amount of instructional time per day required by the TEC, §25.082(a). HB 426 also added to the TEC, §37.008, the requirement that the TEA adopt specific minimum standards for the operation of a DAEP to ensure a quality education for students enrolled in such programs.

Proposed new 19 TAC §103.1201 would implement the TEC, §37.008, by establishing in rule minimum standards for the operation of DAEPs. As directed by statute, the proposed new rule would include provisions relating to student-to-teacher ratios; student health and safety; reporting of abuse, neglect, or exploitation of students; training for teachers in behavior management and safety procedures; and planning for a student's transition from a DAEP to a regular campus.

DAEP standards must be addressed in the district improvement plan.

Julie Harris-Lawrence, Director for Student Support/Discipline, has determined that for the first five-year period the new section is in effect there will be no additional fiscal implications for state or local government as a result of enforcing or administering the new section.

Ms. Harris-Lawrence has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section will be consistent standards of operation for DAEPs that provide for the education of all students regardless of placement. There is no anticipated economic cost to persons who are required to comply with the proposed new section.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins July 25, 2008, and ends August 25, 2008. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments

may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028.

The new section is proposed under the Texas Education Code, §37.008, as amended by House Bill 426, 80th Texas Legislature, 2007, which authorizes the agency to adopt minimum standards for the operation of disciplinary alternative education programs.

The new section implements the Texas Education Code, §37.008.

§103.1201. Standards for the Operation of School District Disciplinary Alternative Education Programs.

(a) A disciplinary alternative education program (DAEP) established in conformance with the Texas Education Code (TEC), §37.008, and this section is defined as an educational and self-discipline alternative instructional program, adopted by local school district policy, for students in elementary through high school grades who are removed from regular classes for mandatory or discretionary disciplinary reasons and placed in a DAEP.

(b) Each DAEP, including each school district participating in a shared services arrangement (SSA) for DAEP services, shall be responsible for ensuring that the board-approved district improvement plan and the improvement plans for each campus required by the TEC, §11.251 and §11.252, include the performance of the DAEP student group for the respective district. The identified objectives for the improvement plans shall include:

(1) student groups served, including overrepresentation of students from economically disadvantaged families, with ethnic and racial representations, and with a disability who receive special education and limited English proficiency services;

(2) attendance rates;

(3) pre- and post-assessment results;

(4) dropout rates;

(5) graduation rates; and

(6) recidivism rates.

(c) A DAEP may be located on-campus or off-campus in adherence with requirements specified in §129.1025 of this title (relating to Adoption By Reference: Student Attendance Accounting Handbook). For reporting purposes, the DAEP shall use the county-district-campus number of the student's locally assigned campus (the campus the student would be attending if the student was not attending the DAEP).

(d) An individual school district or an SSA may contract with third parties for DAEP services. The contract for services shall:

(1) clearly state performance measures and termination provisions to protect the school district's interests; and

(2) include a grievance policy for complaints against the third party that are processed and decided upon by the school district or SSA with input from the complainant and the third party.

(e) The campus of accountability for student performance must be the student's locally assigned campus, including when the individual school district or SSA contracts with a third party for DAEP services.

(f) Each DAEP shall provide an academic and self-discipline program that leads to graduation and includes instruction in each student's currently enrolled foundation curriculum necessary to meet the student's individual graduation plan, including special education services.

(1) A student's four-year graduation plan (minimum, recommended, or distinguished achievement--advanced) may not be altered when the student is assigned to a DAEP. A student must be offered an opportunity to complete a foundation curriculum course in which the student was enrolled at the time of removal before the beginning of the next school year, including correspondence or distance learning opportunities or summer school. A district may not charge for a course required under this section.

(2) The school day for a DAEP shall be at least seven hours but no more than ten hours in length each day, including intermissions and recesses as required under the TEC, §25.082(a).

(3) Notwithstanding subsection (h)(3) of this section, summer programs provided by the district may serve students assigned to a DAEP in conjunction with other students, as determined by local school district policy.

(g) A DAEP program serving a student with a disability who receives special education services shall provide educational services that will support the student in meeting the goals identified in the Individual Education Plan (IEP) established by a duly-constituted admission, review, and dismissal (ARD) committee.

(h) Each DAEP is responsible for the safety and supervision of the students assigned to the program.

(1) The certified teacher-to-student ratio in a DAEP shall be one teacher for each 15 students in elementary through high school grades. Elementary grade students assigned to the DAEP shall be separated from secondary grade students assigned to the DAEP. The designation of elementary and secondary will be determined by adopted local school district policy.

(2) The DAEP staff shall be prepared and trained to respond to health issues and emergencies.

(3) Students in the DAEP shall be separated from students in a juvenile justice alternative education program (JJAEP) and students who are not assigned to the DAEP.

(4) Each DAEP shall establish a board-approved policy for discipline and intervention measures to prevent and intervene against unsafe behavior and include disciplinary actions that do not jeopardize students' physical health and safety, harm emotional well-being, or discourage physical activity.

(i) Staff at each DAEP shall participate in training programs on education, behavior management, and safety procedures that focus on positive and proactive behavior management strategies. The training programs must also target prevention and intervention that include:

(1) training on the education and discipline of students with disabilities who receive special education services;

(2) instruction in social skills and problem-solving skills that addresses diversity, dating violence, anger management, and conflict resolution to teach students how to interact with teachers, family, peers, authority figures, and the general public; and

(3) annual training on established procedures for reporting abuse, neglect, or exploitation of students.

(j) Admission procedures for each DAEP shall be developed and implemented for newly-entering students and their parents or guardians on the expectations of the DAEP, including written contracts between students, parents or guardians, and the DAEP that formalize expectations and establish the students' individual plans for success.

(k) The transition procedures established for a student who is exiting a DAEP and returning to the student's locally assigned campus

shall be implemented and updated annually as needed. The transition procedures shall include:

(1) an established timeline for the student's transition, including scheduled meetings between collaborative groups from the DAEP and the student's locally assigned campus; and

(2) written and oral communication of the student's educational and behavioral progress.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 14, 2008.

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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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For further information, please call: (512) 475-1497

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER G. WORKERS' COMPENSATION INSURANCE

DIVISION 2. GROUP SELF-INSURANCE COVERAGE

28 TAC §§5.6401, 5.6402, 5.6404, 5.6409

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Insurance or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Insurance proposes the repeal of §§5.6401, 5.6402, 5.6404, and 5.6409, concerning group self-insurance coverage. This repeal is necessary because the Department is proposing new sections for adoption that better define and reflect the purpose and scope of the division; more clearly and appropriately define the terms to be used in Division 2 of Subchapter G; more clearly define a workers' compensation self insurance group's (group) responsibilities for notifying the Department of certain specified changes in circumstances; more clearly prescribe a group's responsibility for continuing compliance with the requirements of the Labor Code and Division 2 of Subchapter G; and better define the requirements related to the storage and maintenance of a group's books and records, including allowing a group to locate its books and records outside of the State of Texas. These proposed new sections are also published in this issue of the *Texas Register*.

FISCAL NOTE. Danny Saenz, Senior Associate Commissioner for the Financial Division, has determined that for each year of the first five years the proposed repeal will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. There will be no anticipated effect on local employment or the local economy as a result of the proposed repeal.

PUBLIC BENEFIT/COST NOTE. Mr. Saenz has also determined that for each year of the first five years the proposed repeal is in effect, the anticipated public benefit will be the adoption of new requirements that should result in more efficient regulation of workers' compensation self-insurance groups and their delegated entities, increased financial solvency and stability of groups, and reduced administrative burdens for groups with regard to the storage and maintenance of their books and records.

There are no anticipated economic costs to persons who are required to comply with the proposed repeal.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. As required by the Government Code §2006.002(c), the Department has determined that the proposed repeal will not have an adverse economic effect on any small or micro business because there are no anticipated economic costs to any person who is required to comply with the proposed repeal.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposed repeal and that this proposed repeal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposed repeal must be submitted no later than 5:00 p.m. on August 25, 2008, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be simultaneously submitted to Danny Saenz, Senior Associate Commissioner for the Financial Program, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The repeal of §§5.6401, 5.6402, 5.6404, and 5.6409 is proposed pursuant to the Labor Code §§407A.001, 407A.002, 407A.005, 407A.008, 407A.009, 407A.051, 407A.052, 407A.355, and the Insurance Code §36.001. The Labor Code §407A.001 provides the definitions for the Labor Code Chapter 407A. The Labor Code §407A.002 provides that an unincorporated association or business trust composed of five or more private employers may establish a workers' compensation self-insurance group under the Labor Code Chapter 407A, provided certain stated conditions are met. The Labor Code §407A.005 requires an association of employers to hold a certificate of approval issued under the Labor Code Chapter 407A in order to act as a workers' compensation self-insurance group. The Labor Code §407A.008 provides that the Commissioner shall adopt rules as necessary to implement the Labor Code Chapter 407A. The Labor Code §407A.009 requires an administrator or service company under the Labor Code Chapter 407A that performs the acts of an administrator as defined in the Insurance Code Chapter 4151 to hold a certificate of authority under the Insurance Code Chapter

4151. The Labor Code §407A.051(a) requires an association of employers that proposes to organize as a workers' compensation self-insurance group to file an application for a certificate of approval with the Department. Additionally, the Labor Code §407A.051(b) and (c) enumerates the particular items that must be included in an applicant's application for a certificate of approval. The Labor Code §407A.051(d) requires a group to notify the Commissioner of any change in the information required to be filed under the Labor Code §407A.051(c) or the manner of a group's compliance with the Labor Code §407A.051(c). Finally, the Labor Code §407A.051(e) specifically requires the Commissioner to evaluate the financial information provided with the application as necessary to ensure that the funding is sufficient to cover expected losses and expenses and that the funds necessary to pay workers' compensation benefits will be available on a timely basis. The Labor Code §407A.052 requires the Commissioner to issue a certificate of approval to a proposed group on finding that the group has met the requirements of the Labor Code Chapter 407A Subchapter B. The Labor Code §407A.355 defines insolvent. Additionally, this section also provides that if the Commissioner determines that the group is in a hazardous financial condition, the Commissioner may take action as provided by the Insurance Code Article 21.28-A. The Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by the proposed repeal: Labor Code §§407A.001, 407A.002, 407A.005, 407A.008, 407A.009, 407A.051, 407A.052, and 407A.355.

§5.6401. Purpose and Scope.

§5.6402. Definitions.

§5.6404. Notification to the Department.

§5.6409. Books and Records.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 11, 2008.

TRD-200803577
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: August 24, 2008
For further information, please call: (512) 463-6327

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28 TAC §§5.6401 - 5.6405, 5.6408, 5.6409, 5.6411 - 5.6413

The Texas Department of Insurance proposes amendments to §§5.6403, 5.6405, 5.6408, and 5.6411 and new §§5.6401, 5.6402, 5.6404, 5.6409, 5.6412, and 5.6413, concerning workers' compensation group self-insurance coverage. Proposed amended §5.6403 and §5.6411 and new §5.6402 are necessary to clarify and implement House Bill (HB) 472, enacted by the 80th Legislature, Regular Session, effective September 1, 2007, which amends the Labor Code Chapter 407A and the Insurance Code Chapter 4151. The Department is proposing the remaining amended and new sections under the Labor Code Chapter 407A to better regulate the solvency and financial stability of workers' compensation self-insurance groups (groups); to ensure that workers' compensation benefits are available on a timely basis; to provide for greater flexibility and innovation; to more strictly conform to the statutory requirements of the Labor Code §407A.051(c)(12) and (13) and §407A.057; and to require additional oversight of a group's administrator, service companies, or third party administrators (delegated entities). Additionally, the Department is simultaneously proposing the repeal of existing §§5.6401 (relating to Purpose and Scope), 5.6402 (relating to Definitions), 5.6404 (relating to Notification to Department), and 5.6409 (relating to Books and Records). The proposed repeal of these sections is also published in this issue of the *Texas Register.* This proposal includes a proposed new section to replace each of the repealed sections.

The following paragraphs provide a general discussion of: 1) significant definitional changes to the Labor Code §407A.001 resulting from the enactment of HB 472 and resulting implementation matters; 2) the Department's proposed clarification of these definitional changes; 3) the significance and method of properly categorizing a delegated entity under the proposed sections; and 4) the significance of ensuring the financial solvency of groups; including a brief discussion of the proposed excess insurance, oversight, and contracting requirements. This general discussion will be followed by a detailed section-by-section overview of the proposal.

Definitional Changes and Related Implementation Matters. HB 472 enacts two significant changes to the Labor Code Chapter 407A that affect the regulation of a group's delegated entities. First, HB 472 amends the Labor Code §407A.001 to include the definition of the new term *managing company.* This new definition duplicates the definition of the term administrator in the Labor Code §407A.001(1), which existed prior to the enactment of HB 472, but was not amended by HB 472. As a result, the Labor Code Chapter 407A now contains two separate terms with the same definition. The terms *administrator* and *managing company* are both defined in the Labor Code Chapter 407A to mean "an individual, partnership, or corporation engaged by the board of trustees of a group to implement the policies established by the board of trustees and to provide day-to day management of the group." HB 472 also amends the definition of the term *service company* in the Labor Code §407A.001(8), which existed prior to the enactment of HB 472, by replacing the reference to *administrator* with a new reference to *managing company.* Second, HB 472 enacts the Labor Code §407A.009, which creates a new substantive licensing requirement for administrators and service companies performing the acts of an administrator, as that term is defined in the Insurance Code Chapter 4151. The Department is proposing new §5.6402 and amended §5.6403 and §5.6411 to clarify the meaning of and requirements relating to *administrators* and *managing companies* and to implement the other amendments enacted in HB 472.

First, the addition of the term *managing company* to the Labor Code Chapter 407A is addressed to clarify the statutory responsibilities of a group's delegated entities. For example, while an administrator and managing company are identically defined in the chapter, the Labor Code §407A.009 requires only an administrator under the Labor Code Chapter 407A performing the activities of an administrator, as that term is defined under the Insurance Code Chapter 4151, to hold a certificate of authority under the Insurance Code Chapter 4151. Additionally, although an administrator and managing company are identically defined in the Labor Code §407A.001(1) and (5-a), the amended definition

of the term *service company* in the Labor Code §407A.001(8) only references the term *managing company.* The Labor Code §407A.001(8) defines the term *service company* to mean a person that provides services to the group, other than services provided by the managing company, including claims adjustment; safety engineering; compilation of statistics and the preparation of premium, loss, and tax reports; preparation of other required self-insurance reports; development of members' assessments and fees; and administration of a claim fund. The delineation of the roles and associated responsibilities of a group's delegated entities under the Labor Code Chapter 407A are of particular importance because the Labor Code Chapter 407A prescribes certain requirements that apply only to one type of delegated entity or the other. As such, it is necessary to clarify the roles and responsibilities of each type of delegated entity, while remaining consistent with the provisions of the Labor Code Chapter 407A.

Clarification Related to Prior Treatment of Administrators and Service Companies. Prior to the enactment of HB 472, the Labor Code Chapter 407A recognized only two types of delegated entities of a group--an administrator and a service company. Accordingly, the Labor Code Chapter 407A prescribed specific requirements applicable to either an administrator or a service company. For instance, pursuant to the Labor Code §407A.152, a group was required to engage an administrator to perform its day-to-day management. However, while a group was permitted to also engage the services of a service company, it was not required to do so. Additionally, the Labor Code §407A.051(c)(12) required an administrator to obtain a $250,000 fidelity bond, while under the Labor Code §407A.051(c)(13) and §407A.057, certain qualifying service companies were required to obtain a $250,000 fidelity bond and a $250,000 performance bond. Further, prior to the enactment of HB 472, neither an administrator nor a service company under the Labor Code Chapter 407A was required to hold a certificate of authority to perform the acts of an administrator, as that term is defined in the Insurance Code Chapter 4151, with respect to workers' compensation benefits. Thus, the Labor Code Chapter 407A required categorization of an entity as an administrator or a service company, and each entity was subject only to the requirements of the Labor Code, the Insurance Code, and Department regulations that applied to an administrator or service company, in accordance with such categorization.

The proposed amendments and new sections address the need for clarification of these previously distinct categorizations and associated obligations that arose subsequent to HB 472. HB 472 specifically applies requirements to certain delegated entities of a group, such as administrators and service companies, but does not address the application of these requirements to a managing company, another delegated entity of a group. Further, HB 472 defines an administrator and a managing company identically. This identical definition for these two separate terms raises the question of whether a requirement of HB 472, that by the plain language of the statute applies to an administrator, but not to a managing company, also applies to a managing company under the Labor Code Chapter 407A. For instance, HB 472 requires an administrator or a service company under the Labor Code Chapter 407A performing the acts of an administrator, as that term is defined in the Insurance Code Chapter 4151, to hold a certificate of authority under the Insurance Code Chapter 4151. Under a literal interpretation of this requirement, an individual, partnership, or corporation engaged by the board of trustees of a group to implement the policies established by the board of trustees and to provide day-to day management of the group may simply opt to call itself a managing company, thereby escaping this additional licensing requirement. However, if the same entity opts to calls itself an administrator, the statute plainly requires its licensure under the Insurance Code Chapter 4151. A determination of whether the entity is subject to the licensing requirements of the Insurance Code Chapter 4151 based upon the entity's own categorization of itself, either as an administrator or a managing company, may result in unintended public policy concerns, such as inconsistent application of the licensing requirements of the Insurance Code Chapter 4151. If an administrator and a managing company are identically defined under the Labor Code §407A.001, it would be inconsistent to interpret the statute to apply one requirement under the Labor Code Chapter 407A to an administrator while not applying the same requirement to a managing company. Because of the identical statutory definitions and the lack of any further differentiating delineations in the Labor Code Chapter 407A, the Department is unable to make any distinction between an administrator and a managing company to determine which requirements, functions, or exemptions should apply to one and not the other. Therefore, the Department has determined that, if a requirement applies to either an administrator or a managing company under the Labor Code Chapter 407A, then it must necessarily apply to both, by virtue of the fact that the two entities are identically defined and perform the same functions for a group. This interpretation is consistent with the requirements of the Government Code Chapter 311. Further, a service company is statutorily defined in the Labor Code §407A.001(8) by referencing a managing company. However, this definition must also intuitively include a reference to an administrator, as well. If the usage of the terms *administrator* and *managing company* in the Labor Code Chapter 407A are not clarified so that reference to one term necessarily includes reference to the other term, then the requirements of the Labor Code Chapter 407A cannot be given their intended effect. The chapter's requirements will result in inconsistent application, as determinations regarding whether a particular requirement applies to a specific delegated entity will be based upon how that entity categorizes itself--as an administrator or as a managing company.

Proposed Provisions to Clarify and Effectuate Legislative Intent. Proposed new §5.6402 and amended §5.6403 and §5.6411 are necessary to effectuate the legislative intent of HB 472 and to provide uniform application of the requirements of the Labor Code Chapter 407A. First, proposed new §5.6402 clarifies the meaning of the term *administrator* to include and have the same meaning as the term *managing company* in all contexts. Further, there are no other references to the term managing company in this division. Thus, to the extent that the requirements of the Labor Code Chapter 407A apply to either an administrator or a managing company, this division implements those requirements with respect to an administrator, which necessarily encompasses a managing company in all contexts and without distinction. To this end, proposed new §5.6402 also provides a definition of the term service company that includes a reference to the term *administrator,* which necessarily encompasses a managing company in all contexts and without distinction. Because HB 472 subjects a group's delegated entities that perform the acts of an administrator, as that term is defined in the Insurance Code Chapter 4151, to the requirements of the Insurance Code Chapter 4151, proposed new §5.6402 also prescribes a definition for the new term *third party administrator.* This proposed definition is necessary to implement the portions of HB 472 that specifically relate to a group's administrator, which also encompasses a managing company in all contexts and without distinction, and its service

companies. This proposed definition is used throughout this division to refer to a group's delegated entities that also perform regulated functions under the Insurance Code Chapter 4151.

Categorization of Delegated Entities Under Proposed new §5.6402. In general, the applicability of this division to a particular delegated entity depends entirely upon that entity's categorization under proposed new §5.6402. The categorization of an entity under proposed new §5.6402 is based upon the functions performed by the particular entity on behalf of a group. First, an administrator under proposed new §5.6402(a)(2) is defined as an individual, partnership, or corporation engaged by the board of trustees of a group to implement the policies established by the board of trustees and to provide day-to-day management of the group. Proposed new §5.6402(a)(2) also identifies several of the functions that may be performed by a group's administrator. However, the enumerated functions are illustrative only and are not an exhaustive listing of the functions that an administrator may perform on behalf of a group. In other words, proposed new §5.6402(a)(2) does not, in any way, prohibit an administrator from performing functions that are not specifically enumerated in proposed new §5.6402(a)(2). Second, proposed new §5.6402(a)(12) defines a service company as a person that directly or indirectly provides services to or on behalf of a group, other than the services provided to the group by an administrator. Like proposed new §5.6402(a)(2), proposed new §5.6402(a)(12) also identifies several of the functions that may be performed by a service company on behalf of a group. Again, however, the enumerated functions are illustrative only and are not an exhaustive listing of the functions that a service company may perform on behalf of a group. In other words, proposed new §5.6402(a)(12) does not prohibit a service company from performing functions not specifically enumerated in proposed §5.6402(a)(12), provided that those functions are not already being performed by the group's administrator. Proposed new §5.6402(a)(12) makes clear that a service company may not perform a function on behalf of a group that is already being performed by an administrator for that same group. Lastly, proposed new §5.6402(a)(13) defines a third party administrator as an administrator or service company, as those terms are defined in this division, who holds itself out or acts as an administrator, as that term is defined in the Insurance Code §4151.001(1). This definition is necessary to provide the proper identification of administrators or service companies that collect premiums or contributions from or adjust or settle claims for residents of this state that are related to workers' compensation benefits. While third party administrators, as defined in proposed new §5.6402(a)(13), will also be subject to separate Department regulations applicable to all administrators, as that term is defined in the Insurance Code §4151.001(1), this division prescribes the requirements that will only apply to third party administrators performing delegated functions on behalf of groups. Thus, the proposed requirements in this division will not generally apply to all administrators, as that term is defined in the Insurance Code §4151.001(1). Rather, the proposed requirements in this division will apply only to those administrators, as that term is defined in the Insurance Code §4151.001(1), that are also third party administrators, as defined by proposed §5.6402(a)(13).

Finally, it is important for a group to become familiar with the characterizations of its delegated entities under proposed new §5.6402 because a group's responsibilities under the amended and new sections will often depend upon the appropriate identification of its delegated entities. For example, proposed amended §5.6403(c)(6), (7), and (8) require an applicant to submit fidelity and performance bonds for its administrator, service companies, and service companies performing claims services with its application for a certificate of approval. The specific amount and format of these bonds differ depending upon whether the delegated entity is categorized under the Labor Code Chapter 407A as an administrator, a service company, or a service company providing claims services. Thus, in order to comply with proposed amended §5.6403(c)(6), (7), and (8), an applicant must properly categorize its delegated entities under proposed new §5.6402. This division also requires groups to comply with certain contracting, reporting, oversight and operational review requirements, all of which depend upon the specific categorization of a group's delegated entities. Without properly categorizing its delegated entities under proposed new §5.6402, a group cannot comply with the requirements of this division.

It is also significant to recognize that an entity may be categorized differently depending upon the functions that entity is performing and on whose behalf those functions are being performed. For example, proposed new §5.6402(b) - (e) makes clear that an entity may act as: (i) an administrator for more than one group, in which case the entity would be subject to the requirements of this division that apply specifically to administrators; (ii) the administrator for one group and a service company for another group, in which case the entity would be subject to the requirements of this division that apply to administrators and service companies; or (iii) the administrator or service company for one group and a third party administrator for another group, in which case the entity would be subject to the requirements of this division that apply to administrators, service companies, and third party administrators, as well as other Department regulations relating to administrators, as that term is defined under the Insurance Code Chapter 4151. In instances where a single entity performs various functions for more than one group or performs various functions for the same group, it is imperative for that entity and group to properly categorize the entity under proposed new §5.6402 in order to comply with the requirements of this division.

Examples of Categorizing Delegated Entities Under the Proposed Sections. The complexity of categorizing a group's delegated entities can be best illustrated through a series of examples. For instance, in example number one, if an entity (Entity 1) performs safety engineering services, compilation of statistics, and day-to-day management functions of a group (Group 1), Entity 1 is categorized as an administrator under proposed new §5.6402(a)(2). This is because Entity 1 is engaged to perform day-to-day management functions of Group 1, which is the defining characteristic of an administrator under the Labor Code §407A.001(1) and proposed new §5.6402(a)(2). Proposed new §5.6402(a)(2) also clarifies that an administrator may perform a wide variety of services on behalf of the group, including safety engineering and compilation of statistics. In example number two, however, if Entity 1 performs safety engineering services and compilation of statistics for another group (Group 2) which are not being performed by any other entity for Group 2, but is not engaged by Group 2 to provide day-to-day management functions, Entity 1 is categorized as a service company for Group 2 under proposed new §5.6402(a)(12), but retains its categorization as an administrator under proposed new §5.6402(a)(2) for Group 1. This is because, in example number two, Group 2 did not engage Entity 1 to provide day-to-day management functions. Because Entity 1 is not engaged by Group 2 to act as its administrator, Entity 1 is

performing functions on behalf of Group 2 other than those performed by the group's administrator. As such, Entity 1 meets the definition of a service company under proposed new §5.6402(a)(12) with respect to Group 2. However, because proposed new §5.6402(d) specifically permits an entity to act as an administrator for one group and a service company for another group, Entity 1 also retains its categorization as the administrator of Group 1. In example number three, if Entity 1 is not engaged by Group 3 to provide day-to-day management functions, but performs safety engineering services, compilation of statistics, and also performs the acts of an administrator, as that term is defined under the Insurance Code Chapter 4151, on behalf of Group 3, and assuming that none of these functions are being performed by another entity on behalf of Group 3, Entity 1 is now categorized as a service company and a third party administrator under proposed new §5.6402(a)(2) and (13) for Group 3. However, Entity 1 also retains its categorization as the administrator of Group 1 and the service company of Group 2. Thus, in order for delegated entities and groups to comply with the requirements of this division, each delegated entity must be properly categorized under proposed new §5.6402 based upon the delegated functions the entity performs on behalf of each group.

Downstream Subcontractors. Lastly, the proposed amendments and new sections do not prohibit an administrator, service company, or third party administrator from further delegating the performance of a specific function to another administrator, service company, or third party administrator (downstream subcontractors). In these situations, however, it is still necessary for each delegated entity and its downstream subcontractors to comply with the applicable requirements of this division. Thus, each downstream subcontractor is subject to categorization under proposed new §5.6402, based upon the functions the downstream subcontractor is directly or indirectly performing on behalf of a particular group. Because proposed new §5.6402(b) makes clear that a group may engage only one administrator, any further delegation of a function of an administrator, service company, or third party administrator to another administrator, service company, or third party administrator will necessarily categorize the downstream subcontractor as a service company or a third party administrator, even if the downstream subcontractor is originally categorized as an administrator under proposed new §5.6402(a)(2) with regard to other delegated functions. For example, if the administrator (Administrator 1) of Group 1 further delegates functions to another administrator (Administrator 2) of another group (Group 2), Administrator 2 is categorized as a service company or third party administrator, depending upon the nature of the functions delegated, for Group 1. Administrator 2 retains its categorization as an administrator for Group 2. Likewise, if a service company of Group 1 further delegates functions to another entity, that entity is also categorized as a service company for Group 1.

Proposed Financial Solvency and Excess Insurance Requirements. Proposed amended §5.6405 and §5.6411 and new §5.6412 are necessary to augment a group's solvency and financial requirements, to require oversight of a group's delegated entities, to ensure that workers' compensation benefits are available on a timely basis, and to earlier detect a group's potential hazardous financial conditions. Because Texas had little experience with workers' compensation group self-insurance before 2003, many of the existing initial regulations were modeled after general regulatory requirements applicable to either individual self-insured employers or other workers' compensation insurers. However, several factors unique to the workers' compensation group self-insurance market have since highlighted the need for additional excess insurance requirements and stricter oversight and monitoring of a group's delegated entities. As a result, the Department is proposing amended §5.6405, §5.6411 and new §5.6412.

Pursuant to the Labor Code §407A.054(b), proposed amended §5.6405(a) requires a group to obtain specific excess insurance for losses that exceed a group's retention in an amount that will pay all benefits required under the Labor Code and rules adopted thereunder for a compensable claim. A group obtaining an excess insurance policy meeting this requirement is responsible for paying workers' compensation benefits up to a certain, stated retention amount under the policy. If a claim requires benefit payments beyond the stated retention amount in the policy, the excess insurer is responsible for reimbursing the group for the payment of the benefits that exceed the group's stated retention amount, through the life of the claim. This requirement serves two important purposes. First, it increases the likelihood that an injured worker's claim will be paid timely and that sufficient funding will be available to pay the required benefits for the claim, even if the total amount of the claim, over the life of the claim, is extraordinarily high. Second, it enhances a group's financial health by reducing the financial impact of a catastrophic claim on a group's financial resources. For example, §5.6405(a) currently requires a group to obtain specific excess insurance in an amount of at least $5 million per occurrence. In one example, it is assumed a group obtains a specific excess insurance policy in the amount of $5 million per occurrence with a $1 million retention amount. If a group's member's employee sustains a catastrophic injury that totals $15 million in benefits payable over the life of the claim, the group, after paying the policy's retention amount of $1 million, remains responsible for paying the remaining $9 million for that claim, without reimbursement from the excess insurer. This effect is amplified each time a member's employee sustains a catastrophic injury. So, in this example, if the group sustains two separate catastrophic claims, each totaling $15 million in benefits payable over the life of each claim, the group may not be able to withstand the financial burden of $20 million in total benefits payable over the lives of those two claims. A group's potential financial peril is further highlighted in this example when considering that the group remains responsible for paying all compensable benefits accruing below its stated retention amount of $1 million, in addition to the compensable benefits that exceed its specific excess insurance policy limits of $5 million. In such an event, a group's reserves may become depleted, thereby requiring the group to assess its members for the shortfall. Further, if a particular member of the group is unable to meet the additional assessment obligations, the other members of the group could be required to make up the difference because of their joint and several liability. This could result in some members paying a disproportionate share of the group's assessment. If the group in this example is still unable to collect the necessary assessments from its members, and is declared insolvent, the Texas Group Self-Insurance Guaranty Association (Association) will be responsible for the additional funds necessary to cover the incurred liabilities of the insolvent group. If the Association is unable to cover these incurred liabilities from the funding available to it from its trust fund, pursuant to the Labor Code §407A.458(e), the Association is then authorized to assess all other groups for the remaining deficiency. Thus, where a group does not have adequate excess insurance coverage, the financial implications of a catastrophic claim can be devastating and far-reaching, effecting interests far beyond that of the

individual group sustaining the claims. A group may obtain additional aggregate excess insurance coverage to lessen the financial impact of the compensable claims accruing below the group's stated retention amount in its specific excess insurance policy. However, because the Labor Code Chapter 407A does not require a group to obtain such aggregate coverage, a group not voluntarily obtaining such coverage is still subject to the financial risks highlighted in the previous example.

Proposed amended §5.6405(a) reduces these financial risks, however, by requiring a group to obtain specific excess insurance for losses that exceed a group's retention in an amount that will pay all benefits required under the Labor Code and rules adopted thereunder for a compensable claim. This requirement should better protect the financial solvency and operating condition of the group, as well provide additional assurance that workers' compensation claims are able to be timely and prudently paid. For example, under this requirement, assume that a group obtains a specific excess insurance policy that complies with proposed amended §5.6405(a) and that the group is responsible for paying a $1 million retention amount under the policy for each claim. In this example, if an employee of a member of a group sustains a compensable injury totaling $15 million over the life of the claim, the group's specific excess insurer is responsible for reimbursing the group for the payment of benefits for the claim that exceed the group's $1 million retention amount under the policy. In that event and under the terms of the specific excess insurance policy, the group should not be responsible for paying the additional $14 million in benefits payable for that compensable claim without receiving reimbursement from the excess insurer. This heightened excess insurance requirement in the proposed amendments to §5.6405(a) is intended to provide an enhanced mechanism that will allow a group to satisfy its financial obligations associated with catastrophic claims, while mitigating the risk of endangering or creating a hazardous condition for the group. This should also ensure an overall healthier workers' compensation system in Texas.

The Department recognizes, however, that specific excess insurance policies meeting the requirements of proposed §5.6405(a) amendments may not always be necessary. Thus, the proposed amendments to §5.6405(c) permit a group to petition the Department to obtain excess insurance in a different amount than the amount required by proposed amended §5.6405(a), subject to a minimum floor of $10 million per occurrence. Under the proposed §5.6405(c) amendments, a group must submit an analysis prepared by an actuary of the group explaining the appropriateness of the requested level of specific excess insurance coverage for the group. Additionally, pursuant to the Labor Code §407A.054(b), the Commissioner must consider the current market conditions; a group's size, types of employment, years in existence, and risk exposure; other forms, if any, of additional financial security available to the group; and any other relevant factor in determining whether to grant a group's petition filed under the proposed §5.6405(c) amendments. However, proposed §5.6405(c) also provides that in no event will the Commissioner approve a group's petition for specific excess insurance coverage that is less than $10 million per occurrence. This prohibition establishes the minimum amount of specific excess insurance coverage that a group must obtain and provides a minimum level of protection for a group against its exposure to catastrophic compensable claims. Overall, proposed amended §5.6405 achieves an appropriate balance between ensuring the success of the workers' compensation system by reducing a group's unlimited exposure to catastrophic compensable claims payments and providing groups with a certain level of flexibility to tailor their excess insurance needs to their unique circumstances in the appropriate instances.

Proposed Oversight and Contracting Requirements. Proposed amended §5.6411 and new §5.6412 apply to the oversight of a group's delegated entities. While a group's use of delegated entities may provide cost savings and access to entities with specialized management skills, it also presents special challenges. Because a group's delegated entities often have access to, or control of, the group's funds, accounts, claims files, and records, there is a greater opportunity for fraud and mismanagement by the delegated entities. For example, the Department is aware of an instance where an administrator failed to timely inform a group that the group was operating in a potentially hazardous financial condition. In that instance, the group was not made fully aware of the financial statement and its operational implications for a prolonged period of time. Further, the Department has been informed of instances where a group's administrator poorly monitored group membership, to the point that certain members did not properly execute indemnity agreements. Lastly, the Department is aware that some groups lack sufficient internal oversight processes over their delegated entities, making it difficult for these groups to adequately oversee the performance of their delegated entities. As a result, proposed amended §5.6411 and new §5.6412 require a group to implement and maintain a minimal level of oversight and responsibility for the actions of its delegated entities. These requirements are especially important because a group retains the ultimate responsibility and accountability for each function its delegated entities perform. Thus, it is imperative that a group monitor the activities of its delegated entities to ensure their compliance with the Insurance Code, the Labor Code, and the regulations adopted thereunder.

To this end, proposed amended §5.6411 imposes minimal contracting requirements between: (i) a group and its delegated entities; and (ii) between a delegated entity and another administrator, service company, or third party administrator (downstream subcontractors) in certain circumstances. Proposed amended §5.6411 first requires a group to enter into a written agreement with its administrator, third party administrators, and any service company that has management or discretionary decision making authority relating to a function the group retains ultimate responsibility for under the Labor Code, the Insurance Code, or regulations adopted thereunder. Additionally, proposed amended §5.6411 requires the written agreement to contain certain provisions that clearly delineate the roles and responsibilities of the contracting parties. These requirements ensure that both the group and its delegated entity understand their responsibilities under the agreement. Additionally, these requirements establish a group's expectations related to the performance of the delegated duties. For example, proposed amended §5.6411(d) requires a group to describe the specific functions the delegated entity will be performing on its behalf, including any applicable instructions related to the performance of those functions. Proposed amended §5.6411(d) also requires each written agreement to contain a provision requiring each delegated entity to hold the appropriate license or authorization required under the Labor Code or the Insurance Code. These minimal requirements serve an important purpose. Because a group retains ultimate responsibility and accountability for all of its delegated functions, each group should be familiar with its delegated entities and the functions they are performing on the group's behalf. In order for a group to exercise appropriate oversight over its delegated entities, it must first identify: (i) its delegated entities; (ii) what func-

tions those delegated entities will be performing; and (iii) what its expectations are with respect to the performance of those functions. Once those expectations are memorialized in a written agreement between the group and its delegated entities, it is easier for the group to monitor and ensure that its delegated entities are, in fact, performing those functions in accordance with the terms of the written agreement.

Proposed amended §5.6411 also addresses continuity of services and continuing access to a group's books and records. The Department is aware of situations where administrators, as that term is defined under the Insurance Code Chapter 4151, have refused to timely return the books and records of an insurer or have denied access to an insurer's books and records. These situations typically involved an insurer that decided to end the employment of one Chapter 4151 administrator and employ the services of another Chapter 4151 administrator. These situations also usually occurred when there was an inadequate written agreement between the parties, or where the written agreement between the parties did not sufficiently address transition and ownership issues. While these particular instances involved insurers, the regulatory concern for groups is the same. A delegated entity's refusal to provide a group with access to its own books and records can have disastrous and widespread results, especially with regard to the payment of workers' compensation claims. A group cannot comply with the requirements of the Insurance Code or the Labor Code without knowing which of its claims has been paid or which of its claims remain outstanding. Additionally, a group may be put into a hazardous financial condition if it is unable to access its financial books and records. In an effort to prevent these situations, proposed amended §5.6411(d) requires a written agreement between a group and its delegated entities to include a provision addressing continuity of services, including run-off fee schedules and the transfer of the books and records of a group from one administrator, service company, or third party administrator to another administrator, service company, or third party administrator. Additionally, proposed amended §5.6411(e) requires that each written agreement between the group and its delegated entities ensure that the group has ongoing, continuing access to its books and records at all times.

The proposed amendments to §5.6411(b) also requires a group's delegated entities to enter into a written agreement with their downstream subcontractors, but only if: (i) a delegated entity further delegates a portion of its management or discretionary decision making authority to a downstream subcontractor; and (ii) that delegated management or discretionary decision making authority relates to a function the group retains ultimate responsibility for under the Labor Code, the Insurance Code, or regulations adopted thereunder. In those cases, the written agreement between the delegated entity and the downstream subcontractor must meet the same requirements as a written agreement between a group and a delegated entity. This requirement is necessary to ensure continuing oversight of a group's delegated entities. The more times that a particular function is delegated from one entity to another, the greater the risk of non-performance or inadequate performance of that function becomes. A group retains ultimate responsibility and accountability for each function regulated under the Labor Code, the Insurance Code, or regulations adopted thereunder, regardless of the number of times the performance of that function is delegated from one entity to another. Requiring a written agreement between a group's delegated entities and their downstream subcontractors assists a group in exercising oversight over these downstream subcontractors to ensure that: (i) the delegated functions are being performed accurately, timely, and in accordance with the group's instructions and expectations; (ii) the group knows which entity is responsible for performing the delegated functions at all times; (iii) the group knows which entity has possession of, or access to, its books and records; and (iv) the group retains the ownership of, and access to, its books and records at all times.

Proposed Annual Operational Review Plan Requirements. To further emphasize the importance of a group's regular oversight over its delegated entities, proposed new §5.6412 requires the board of trustees of a group to adopt an annual operational review plan that provides for sufficient oversight of a group's delegated entities and their downstream subcontractors. Proposed new §5.6412 highlights the types of information that a group should request from its delegated entities and their downstream subcontractors and review on a regular basis. Reviewing this information should enable a group to better assess its ability to meet its obligations under the Labor Code, the Insurance Code, and regulations adopted thereunder. Additionally, it is anticipated that a group's regular review of the required information will enable the group to foresee potential financial problems or solvency issues at a much earlier date, so that corrective action can be taken immediately. Further, proposed new §5.6412 emphasizes the importance of each group establishing its own performance goals and reviewing the performance of its delegated entities and their downstream subcontractors to determine if those goals are being met. Lastly, proposed new §5.6412 requires the board of trustees of a group to consider the information submitted by the group's delegated entities and their downstream subcontractors pursuant to the group's operational review plan and to make appropriate recommendations based upon that information. By regularly monitoring and overseeing its delegated entities and their downstream subcontractors, a group will obtain a better idea of its own capabilities, strengths, and weaknesses, which should result in financially healthier groups.

Proposed Clarification of Existing Rules. The remaining proposed amendments and new sections are a result of collaborative discussion with industry representatives and stakeholders regarding the clarification and reconsideration of the existing regulations. Proposed amended §5.6408 and new §§5.6404, 5.6409, and 5.6413 provide additional flexibility for groups and their delegated entities, reduce certain regulatory filing requirements, and provide greater guidance regarding the expectations of the Department with regard to industry compliance with the rules in this division.

Pursuant to the Labor Code §407A.455(3), the Department met with representatives of the Association in January and February, 2008, to discuss the Association's recommendations and concerns regarding the regulations applicable to groups. The Department also sought input from industry representatives and stakeholders and posted an informal working draft of the Department's proposed amendments to this division on the Department's website in November, 2007. The Department received several written comments regarding the informal working draft of the proposed amendments to this division. Further, the Department discussed the informal working draft of the proposed amendments to this division with representatives of the Association and industry in a small workgroup. The Department exchanged at least two separate informal working drafts of the amendments to this division with the small workgroup. As a result of the written comments provided by industry representatives and the collaborative discussions with the small workgroup, the Department modified several sections of the informal work-

ing draft of the proposed amendments to clarify definitions, to better define the roles and responsibilities of groups' delegated entities and their downstream subcontractors, to clarify the information that must be submitted to the Department upon application for a certificate of approval, to reduce unnecessary and duplicative administrative burdens related to bonds, biographical affidavits, and membership cancellation and termination notification, to clarify contracting requirements, and to permit the industry to take advantage of innovative, cost-saving methods of storing and maintaining books and records. Finally, the Department provided a copy of these final amendments to the small workgroup for further consideration in April, 2008.

Section-by-Section Overview. The following is a section by section overview of the proposal.

§5.6401. Purpose and Scope. Proposed new §5.6401 is necessary to better define and reflect the purpose and scope of the division, which is to establish the licensing, contracting, reporting, and financial requirements, procedures, responsibilities, and obligations applicable to applicants and groups.

§5.6402. Definitions. Proposed new §5.6402 generally defines the terms that are used in this division and provides necessary clarification and guidance regarding the role and responsibility of each of a group's delegated entities. First, proposed new §5.6402(a) clarifies the meaning of the term *managing company* in the Labor Code §407A.001(5-a), as added by HB 472, and as discussed previously in this proposal. Because the term *managing company* is defined identically in the Labor Code §407A.001(5-a) as the existing term *administrator* in the Labor Code §407A.001(1), proposed new §5.6402(a) clarifies that *managing company* has the same meaning as *administrator* and that any reference to the term *administrator* in this division, in all contexts, necessarily includes and references both *managing company* and *administrator.* Additionally, proposed new §5.6402(a) adds a definition for the new term *third party administrator,* which further clarifies the permitted roles and responsibilities of a group's delegated entities, with specific reference to the requirements of HB 472. Finally, proposed new §5.6402(a) provides a definition for the term books and records, provides additional clarity to the definition of *service company,* and more accurately incorporates the statutory requirements specified in the Labor Code §407A.002 for the formation of a group into the definition of *group.* Proposed new §5.6402(b) - (e) provides necessary clarification regarding the permitted roles of a group's administrator, service company, or third party administrator. Proposed §5.6402(b) provides that a group may only engage one administrator to implement the policies established by the board of trustees of the group and to provide day-to-day management of the group. However, this proposed section also makes clear that a group may engage more than one service company to provide services to the group. Proposed §5.6402(c) clarifies that an individual, partnership, or corporation may act as an administrator for more than one group. Proposed §5.6402(d) clarifies that an individual, partnership, or corporation may act as an administrator for one group and as a service company for another group. Lastly, proposed §5.6402(e) provides that an individual, partnership, or corporation may not act as an administrator and a service company for the same group at the same time. This limitation is based on the definition of *service company* in the Labor Code §407A.001(8) and the clarified definitions of *administrator* and *service company* in proposed new §5.6402(a)(2) and (12) of this division, which define a service company as a person that directly or indirectly provides services to or on behalf of a group, other than those services provided by an administrator. While both an administrator and a service company may provide the same kinds of services to a group, a group must designate an individual, partnership, or corporation to serve as its administrator pursuant to the Labor Code §407A.152. The group may delegate any function it is responsible for performing to its administrator. Any function that is not delegated to or performed by a group's administrator may be delegated to a service company directly or indirectly. This interpretation is consistent with the statutory definition of *service company* in the Labor Code §407A.001(8), which contemplates such an arrangement. Proposed §5.6402(e) does not, in any way, limit the functions that may be performed by either an administrator or a service company. Rather, this proposed subsection clearly delineates that an entity may not be categorized as an administrator and a service company for the same group at the same time.

§5.6403. Application for Initial Certificate of Approval. Proposed amended §5.6403 generally requires an unincorporated association or business trust composed of five or more private employers that propose to organize as a workers' compensation self-insurance group to file an application for a certificate of approval with the Department. Additionally, proposed amended §5.6403 enumerates the items that must be included in an application for a certificate of approval. Proposed amended §5.6403(a) is necessary for consistency with proposed new §5.6402(a)(7), which more accurately incorporates the statutory requirements for the formation of a group into the definition of the term *group.* Proposed amended §5.6403(c)(6), (7), and (8) clarify the statutory requirements that administrators, service companies, and service companies providing claims services must obtain fidelity or performance bonds, as applicable. First, proposed amended §5.6403(c)(6) requires an administrator to obtain a fidelity bond in the amount of $250,000. Additionally, the fidelity bond must meet the requirements of proposed amended §5.6408, which further specifies the required content and form of the bond. If an entity acts as an administrator for more than one group, that entity must obtain a new fidelity bond in the amount of $250,000 that meets the requirements of proposed amended §5.6403(c)(6) for each group for which the entity acts as an administrator. Proposed amended §5.6403(c)(7) requires each service company identified pursuant to proposed amended §5.6403(c)(12)(A) or (B), if there is one, to obtain a fidelity bond in the amount of $250,000. Proposed amended §5.6403(c)(7) also requires this fidelity bond to meet the requirements of proposed amended §5.6408. If an entity acts as a service company for more than one group, that entity must obtain a new fidelity bond in the amount of $250,000 that meets the requirements of proposed amended §5.6403(c)(7) for each group for which the entity acts as a service company and is identified by that group under proposed amended §5.6403(c)(12)(A) or (B). Lastly, proposed amended §5.6403(c)(8) requires each service company identified pursuant to proposed amended §5.6403(c)(12)(A) that provides claims services to or on behalf of a group, if there is one, to obtain a performance bond in the amount of $250,000. Proposed amended §5.6403(c)(8) makes clear that this performance bond is in addition to the fidelity bond required in proposed amended §5.6403(c)(7) for a service company identified pursuant to proposed amended §5.6403(c)(12)(A) or (B). Further, proposed amended §5.6403(c)(8) requires this performance bond to be in the form prescribed in proposed amended §5.6408. A service company qualifying under proposed new §5.6402(a)(13) as a third party administrator will, in all cases where the service company is performing claims services, be subject to the performance bond requirements of

proposed amended §5.6403(c)(8) because a third party administrator providing services to or on behalf of a group must always be identified pursuant to proposed amended §5.6403(c)(12)(A). On the other hand, an administrator qualifying under proposed new §5.6402(a)(13) as a third party administrator is not subject to the additional performance bond requirement of proposed amended §5.6403(c)(8). The additional performance bond requirement applicable to service companies providing claims services is a direct result of the Labor Code §407A.057(a), which specifically refers to a service company providing claims services to a group. The Labor Code §407A.057(a) does not prescribe requirements for an administrator providing claims services to a group, so the bond requirements of proposed amended §5.6403(c)(8) do not apply to administrators providing claims services. The requirements of proposed amended §5.6403(c)(7) and (8) do apply, however, to each entity that is categorized under proposed new §5.6402(a)(12) or (13) as a service company or as a service company that is also a third party administrator. For example, if an entity is categorized under proposed new §5.6402(a)(2) as an administrator (Administrator 1) for Group 1, but also performs delegated functions for another group (Group 2) that categorize Administrator 1 as a service company under proposed new §5.6402(a)(12) for Group 2, Administrator 1 is subject to the bond requirements of proposed amended §5.6403(c)(6) and (7). If Administrator 1 also performs delegated claims services for Group 2, Administrator 1 is also subject to the bond requirements of proposed amended §5.6403(c)(8) because Administrator 1 is categorized as a service company that is also a third party administrator under proposed new §5.6402(a)(13) for Group 2. In another example, if an entity qualifies as a service company for Group 1 and as a service company for Group 2, the entity is subject to the bond requirements of proposed amended §5.6403(c)(7) for both groups. If the same entity retains its categorization as a service company, but also qualifies as a third party administrator for one of the groups, the entity is subject to the bond requirements of proposed amended §5.6403(c)(8), as well. The bond requirements of proposed amended §5.6403(c)(7) and (8) also apply to a delegated entity's downstream subcontractors in the same manner. Proposed amended §5.6403(c)(12) requires a group to submit a general business plan or plan of operation describing the group's general business activities, safety program, and organization to the Department as part of its application for a certificate of approval. Additionally, proposed amended §5.6403(c)(12)(A) requires a group's business plan or plan of operation to include the identity of the group's administrator and any third party administrator that provides services to or on behalf of the group. Under this proposed requirement, a group's business plan or plan of operation must also identify a delegated entity's downstream subcontractors, if those downstream subcontractors are categorized as third party administrators under proposed new §5.6402(a)(13) for that group. Proposed amended §5.6403(c)(12)(B) requires a group's business plan or plan of operation to provide the identity of any service company that has management or discretionary decision making authority relating to a function the group maintains ultimate responsibility for under the Labor Code, the Insurance Code, or regulations adopted thereunder. This proposed subparagraph does not require a group's business plan or plan of operation to identify every service company that may perform functions on its behalf. Rather, proposed amended §5.6403(c)(12)(B) only applies to a service company that meets two specific requirements. First, the service company must have management or discretionary decision making authority. Second, that management or discretionary decision making authority must relate to a function the group maintains ultimate responsibility for under the Labor Code, the Insurance Code, or regulations adopted thereunder. Proposed amended §5.6403(c)(12)(B) also applies to certain downstream subcontractors, as well. In total, proposed amended §5.6403(c)(12)(B) applies to each service company that has management or discretionary decision making authority relating to a function the group retains ultimate responsibility for under the Labor Code, the Insurance Code, or regulations adopted thereunder, as well as any downstream subcontractor that is categorized as a service company under proposed new §5.6402(a)(12) and has management or discretionary decision making authority relating to a function the group retains ultimate responsibility for under the Labor Code, the Insurance Code, or regulations adopted thereunder. Proposed amended §5.6403(c)(12)(C) requires a group's business plan or plan of operation to identify its accountant and actuary. Finally, proposed amended §5.6403(c)(12)(D) and (E) require a group's business plan or plan of operation to provide the identity of the affiliates of any person identified pursuant to proposed amended §5.6403(c)(12)(A) or (B), as well as a general description of the experience, qualifications, facilities, and personnel of any of those identified persons. This requirement will help identify any potential conflicts of interest among a group's delegated entities and downstream subcontractors. Proposed amended §5.6403(c)(13) and (14) require a group to submit a copy of each written agreement required under proposed amended §5.6411 of this division (relating to Contract Provisions) and a statement from the group that its third party administrators either hold the required authorization from the Department or have applied for the required authorization from the Department. In the event that a group's third party administrator has applied for the required authorization from the Department, proposed amended §5.6403(14) also requires a statement from the group that it will verify that such authorization is granted by the Department before allowing the third party administrator to provide services to or on behalf of the group. Proposed amended §5.6403(e) requires a biographical affidavit to be submitted to the Department by each member of the initial board of trustees of a group, subsequent members of the board of trustees of a group, and the executive officers of a person identified pursuant to proposed amended §5.6403(12)(A) or (B). Additionally, under proposed amended §5.6403(e), a particular individual does not have to file a biographical affidavit with the Department if a biographical affidavit from the individual has been filed with the Department within the prior three years and contains substantially accurate information. Proposed amended §5.6403(e) further elaborates that a biographical affidavit contains substantially accurate information if the responses given by the individual in the affidavit on file with the Department continue to indicate sufficient experience, ability, standing, and good record to make success of a group probable. Proposed amended §5.6403(f) requires each member of the initial board of trustees of a group, subsequent members of the board of trustees of a group, and the executive officers of a person identified pursuant to proposed amended §5.6403(c)(12)(A) or (B) to comply with the requirements of Chapter 1 Subchapter D of this title (relating to Effect of Criminal Conduct). Proposed amended §5.6403(g) eliminates the dual bonding requirement applicable to those *administrators* and *service companies* under proposed new §5.6402(a)(2) and (12) of this division that also qualify as *administrators* under the Insurance Code Chapter 4151. The Insurance Code §4151.055 requires an administrator, as that term is defined under that chapter, to obtain a fidelity bond.

Additionally, the Labor Code §407A.051(c)(12) and (13) requires a group's administrator and service company to also obtain a fidelity bond. As a result, one entity might be subject to the fidelity bond requirements of both the Insurance Code and the Labor Code if that entity is categorized as: (i) an administrator under proposed new §5.6402(a)(2) and as an administrator under the Insurance Code §4151.001(1), resulting in that entity being subject to the requirements of both proposed amended §5.6403(c)(6) and the Insurance Code §4151.055; or (ii) a service company under proposed new §5.6402(a)(12) and as an administrator under the Insurance Code §4151.001(1), resulting in that entity being subject to the requirements of proposed amended §5.6403(c)(7) and the Insurance Code §4151.055. The amount of the fidelity bonds required under the Labor Code §407A.051(c)(12) and (13) will be higher than the amount of a fidelity bond required under the Insurance Code §4151.055 in the majority of circumstances, and the requirements for the content of the fidelity bonds are virtually the same under proposed amended §5.6403(6) and (7) and the Insurance Code §4151.055. Thus, the interest of the public is not negatively affected by the §5.6403(g) elimination of the duplicative fidelity bond requirement for administrators and service companies, and the benefit to these affected administrators and service companies may be significant. Proposed amended §5.6403(h) provides that, pursuant to the Labor Code §407A.051(b)(7), the Commissioner may require the submission of any other relevant information deemed necessary in determining whether to approve or disapprove an application for a certificate of approval. The remaining proposed amendments to §5.6403 are necessary to correct grammatical errors and to re-designate the paragraphs accordingly.

§5.6404. Notification to the Department and Responsibility for Continued Compliance. Proposed new §5.6404 generally describes the circumstances under which a group is required to provide written notification to the Department and also clarifies the group's responsibilities for maintaining certain qualifications. First, proposed new §5.6404(a), pursuant to the Labor Code §407A.051(d), requires a group to provide written notice to the Department of any change in the information filed by the group under the Labor Code §407A.051(c) or proposed amended §5.6403 or the group's manner of compliance with the Labor Code §407A.051(c) or proposed amended §5.6403 no later than 30 days after the effective date of the change. For example, if a group files its initial application for a certificate of approval with the Department and identifies Administrator A as its administrator, but later wishes to engage the services of Administrator B in lieu of Administrator A, proposed new §5.6404(a) requires that group to notify the Department of such a change, because proper identification of a group's administrator is required pursuant to proposed amended §5.6403(c)(12)(A). Proposed new §5.6404(b) clarifies that a group must meet the requirements of the Labor Code §407A.051(c) and proposed amended §5.6403, as those requirements apply to any change of information identified by a group under proposed new §5.6404(a). This proposed subsection makes clear that any change a group makes with regard to the information it files with the Department pursuant to proposed amended §5.6403 or the Labor Code §407A.051(c) must still comply with the requirements of proposed amended §5.6403 and the Labor Code §407A.051(c). For example, if a group changes its administrator, the group must still meet the requirements of proposed amended §5.6403 and the Labor Code §407A.051(c) that relate to a group's administrator, such as providing an appropriate fidelity bond for the new administrator. This is because a fidelity bond for an administrator is required under proposed amended §5.6403(c)(6) and the Labor Code §407A.051(c), and the group must meet such requirement in its initial filing with the Department. Proposed new §5.6404(c) requires a group to provide written notice to the Department no later than 10 days of first becoming aware that any hazardous financial condition exists, or that, in the opinion of a group's administrator, that any hazardous financial condition is likely to occur. This proposed subsection also defines a hazardous financial condition to include the conditions described in the Labor Code §407A.355(a) and (b), as well as any event, series of events, or negative trend which may affect the group's ability to continue as a viable group. Proposed new §5.6404(d) requires a group to execute a written statement acknowledging its responsibilities under proposed new §5.6404. Lastly, proposed new §5.6404(e) requires a group to maintain the qualifications necessary to obtain a certificate of approval under the Labor Code Chapter 407A at all times. For example, pursuant to the Labor Code §407A.053(a), a group must meet the requirements of the Labor Code §407A.053(c) in order to obtain a certificate of approval under the Labor Code Chapter 407A. The Labor Code §407A.053(c) requires a group to post security in the form and amount prescribed by the Commissioner, equal to the greater of $300,000 or 25 percent of the group's total incurred liabilities for workers' compensation. Under one example, it is assumed that an applicant posts security in the amount of $300,000 at the initial time of application for a certificate of approval under the Labor Code Chapter 407A, and at that time, $300,000 is greater than 25 percent of the group's projected total incurred liabilities. One year later, however, under the example, it is assumed that 25 percent of the group's total incurred liabilities for workers' compensation is $500,000. Proposed new §5.6404(e) makes clear that, in this example, the group is now required to post security in the amount of $500,000, because this amount is greater than the original $300,000 posted by the group, and the group must meet the requirements of the Labor Code §407A.053(c) in order to obtain and maintain its certificate of approval under the Labor Code Chapter 407A.

§5.6405. Excess Insurance. Proposed amended §5.6405(a) requires a group to obtain specific excess insurance for losses that exceed a group's retention in an amount that will pay all benefits required under the Labor Code and rules adopted thereunder for a compensable claim, unless otherwise approved by the Commissioner. Proposed amended §5.6405(c) permits a group to petition the Department to obtain specific excess insurance in an amount that is different than the amount required by proposed amended §5.6405(a). This proposed amended section also enumerates the factors the Commissioner must consider in determining whether to grant a group's petition, including current market conditions; a group's size, types of employment, years in existence, and risk exposure; other forms, if any, of additional financial security available to the group; and any other relevant factors. Lastly, proposed amended §5.6405(c) prescribes that, in no event, may a group's excess insurance coverage be less than $10 million per occurrence. Proposed amended §5.6405(d) requires a group to submit to the Department an analysis prepared by an actuary of the appropriate level of specific excess insurance for the group to assist the Commissioner in determining whether to grant a group's petition under proposed amended §5.6405(c).

§5.6408. Fidelity and Performance Bonds. Proposed amended §5.6408 further defines the content, format, prohibitions, and requirements for a fidelity or performance bond required of an administrator or service company under proposed amended

§5.6403(c)(6), (7), or (8). Specifically, proposed amended §5.6408(a) requires a fidelity bond required of an administrator under the Labor Code §407A.051(c)(12) and a service company under the Labor Code §407A.051(c)(13) to protect against an act of fraud or dishonesty by the administrator or service company in exercising its powers and duties as an administrator or service company. This proposed amended section also requires a fidelity bond or performance bond to be payable to the group. Proposed amended §5.6408(b) requires a performance bond required under the Labor Code §407A.057 to be in the format prescribed in proposed amended §5.6408(c). Proposed amended §5.6408(c) provides the format and content for a performance bond required under the Labor Code §407A.057. Proposed amended §5.6408(d) prohibits an administrator or service company from obtaining a fidelity bond or performance bond required under proposed amended §5.6403(c)(6), (7), or (8) from any person except a surety company authorized to engage in business in this state as a surety or an eligible surplus lines insurer in compliance with the Insurance Code Chapter 981 and regulations adopted thereunder. Finally, proposed amended §5.6408(e) requires an administrator or service company to immediately inform the Commissioner and the group, in writing, if a fidelity or performance bond required under proposed amended §5.6403(c)(6), (7), or (8) is cancelled or terminated, and is not replaced with new coverage that meets the requirements of the Labor Code Chapter 407A and this division and that is effective concurrently upon the date of the cancellation or termination. Further, proposed amended §5.6408(e) provides that the required notification shall not, in any event, be given later than five business days from the date the administrator or service company first becomes aware of the cancellation or termination of the fidelity or performance bond. Proposed amended §5.6408(e) does not affect a group's responsibility to notify the Department of any change in the information filed by the group under the Labor Code §407A.051(c) and §5.6403 (relating to Application for Initial Certificate of Approval). Lastly, the remaining proposed amendments to §5.6408 re-designate the paragraphs accordingly.

§5.6409. Books and Records. Proposed new §5.6409(a) establishes the scope of the proposed new section, clarifying that the proposed new section applies to all books and records of a group, including both written and electronic, regardless of whether those books and records are located within the State of Texas or outside the State of Texas. Proposed new §5.6409(b) permits a group to locate its books and records outside of the State of Texas, provided certain requirements are met. Specifically, in order for a group to locate its books and records outside the State of Texas, a group must submit prior written notice to the Department that: (i) provides the specific address outside the State of Texas where the group's books and records will be located; (ii) identifies the types of books and records that will be located outside the State of Texas, including those that will be maintained in an electronic format; (iii) identifies the vendor of a leased or purchased software or electronic platform who will provide services to the group related to the maintenance of the group's books and records, if applicable: and (iv) includes the group's continuity plan in the event of cancellation of termination of the arrangement with a vendor identified by the group pursuant to paragraph (3) of proposed new §5.6409(b), if applicable. Proposed new §5.6409(c) requires all books and records of a group to be electronically or physically accessible to the Department, upon the Department's request, and to be maintained in a manner that provides an audit trail between the group's general ledger and the group's source documents. Proposed new §5.6409(d) requires a group's electronic books and records to be maintained with reasonable controls to ensure the integrity, accuracy, and reliability of the electronic storage system and to prevent the deterioration of the electronic books and records. Pursuant to proposed new §5.6409(e), a group must ensure a weekly backup of its electronic books and records. Additionally, proposed new §5.6409(f) requires a group to be able to access a complete and current set of its electronic books and records or a complete and current backup of its electronic books and records from a location in the State of Texas at all times. Proposed new §5.6409(g) and (h) provide that proposed new §5.6409 does not in any way limit the Commissioner's authority under the Labor Code §407A.252 and §407A.355, and indicates that, in the event of a conflict between a provision of proposed new §5.6409 and the Labor Code §407A.252 or §407A.355, the provision of the Labor Code §407A.252 or §407A.355 prevails. Lastly, proposed new §5.6409(i) provides a 30-day grace period from the effective date of proposed new §5.6409 for a group to comply with its provisions, provided that the group holds a certificate of approval issued prior to the effective date of proposed new §5.6409.

§5.6411. Contract Provisions. Proposed amended §5.6411 prescribes the contracting requirements applicable to: (i) a group and its delegated entities and (ii) a delegated entity and its downstream subcontractors. First, proposed amended §5.6411(a) requires a group to execute a written agreement with any person identified pursuant to proposed amended §5.6403(c)(12)(A) or (B) that meets the requirements of proposed amended §5.6411. As discussed previously in this proposal, a person identified pursuant to proposed amended §5.6403(c)(12)(A) or (B) includes a group's administrator, third party administrators, and any service company that has management or discretionary decision making authority relating to a function the group maintains ultimate responsibility for under the Labor Code, the Insurance Code, or regulations adopted thereunder. Proposed amended §5.6411(b) prescribes the contracting requirements applicable to a group's delegated entities and their downstream subcontractors. Specifically, proposed amended §5.6411(b) applies only to a person identified pursuant to proposed amended §5.6403(c)(12)(A) or (B) who further delegates any of its management or discretionary decision making authority relating to a function a group retains ultimate responsibility for under the Labor Code, the Insurance Code, or regulations adopted thereunder to another administrator, service company, or third party administrator. If a person identified pursuant to proposed amended §5.6403(c)(12)(A) or (B) does delegate such authority to another administrator, service company, or third party administrator, then proposed amended §5.6411(b) requires that person to execute a written agreement with that downstream administrator, service company, or third party administrator that meets the requirements of proposed amended §5.6411. Proposed amended §5.6411(d) enumerates the minimal provisions that must be included in a written agreement under the proposed section, including: (i) a requirement that the delegated entity or downstream subcontractor must comply with the applicable requirements of the Insurance Code and the Labor Code and rules adopted thereunder, including holding the appropriate license or authorization from the Department; (ii) a requirement that the delegated entity or downstream subcontractor must permit the Commissioner or the group to examine, at any time, its financial solvency and ability to perform its responsibilities under the written agreement; (iii) a description of the duties that the delegated entity or downstream subcontractor is expected to perform and any applicable instructions related to the per-

formance of those services, including references to a group's claims handling practices or procedures; and (iv) a provision relating to the continuity of services, including run-off fee schedules and the transfer of the books and records of a group from one administrator, service company, or third party administrator to another administrator, service company, or third party administrator. Proposed amended §5.6411(e) also requires a written agreement entered into between a group and its delegated entity or between a delegated entity and its downstream subcontractor to ensure that the books and records of a group remain the property of the group at all times, are available to the group or its designee at any time while in the custody of a delegated entity or downstream subcontractor, and that those books and records will be timely transferred to a group or its designee upon request of the group and at the termination or cancellation of the written agreement. Lastly, proposed amended §5.6411(f) provides that a written agreement required under subsection §5.6411 (a) or (b) must meet the requirements of §5.6411 no later than June 1, 2009. The remaining proposed amendments to §5.6411 are necessary to correct inconsistent references, to correct grammatical errors, to increase readability, and to re-number the paragraphs accordingly.

§5.6412. Operational Review Plan. Proposed new §5.6412(a) requires a group to annually adopt an operational review plan that provides for sufficient oversight of any person who has entered into a written agreement pursuant to §5.6411(a) or (b) (relating to Contract Provisions), which may be modified at any time to meet a group's needs. Proposed new §5.6412(b) prescribes the minimal requirements for a group's operational review plan. Specifically, proposed new §5.6412(b)(1) requires a group's operational review plan to include the group's estimated projections for the specific information enumerated in proposed new §5.6412(b)(2)(A) - (C). Proposed new §5.6412(b)(2) requires a group's operational review plan to require any person who has entered into a written agreement pursuant to §5.6411(a) or (b) to submit quarterly reports to the group containing the information described in proposed new §5.6412(b)(2)(A) - (C), which includes projected premium revenue for the current fund year and comparison to premium revenue for the previous fund year, membership counts, and a summary of the performance of the group for each fund year in which the group has been in existence, taking into account the number of claims reported, incurred losses, premium received, loss ratios, expense ratios, and delineations of claims likely to exceed the specific retention and fund years likely to exceed any aggregate retention. Lastly, proposed new §5.6412(b)(3) requires a group's operational review plan to provide for corrective action, as determined by the board of trustees of the group, if the performance of the group does not meet its estimated projections required under proposed new §5.6412. Proposed new §5.6412(c) requires the board of trustees of a group to consider the reports submitted by a group's delegated entities and downstream subcontractors as part of its operational review plan. Additionally, those reports, the board's consideration of those reports, and the board's recommendations for the group based upon those reports must be noted in the minutes of the board of trustees of the group and must be maintained in the books and records of the group.

§5.6413. Membership Cancellation or Termination. Proposed new §5.6413(a) requires a group to notify the Commissioner pursuant to the Labor Code §407A.201(c) only if the group experiences a reduction in membership, caused by either cancellation or termination, resulting in a cumulative reduction of 10 percent or more of its annual written premium, not later than the 10th day after the date on which the cumulative reduction in membership takes effect. Further, proposed new §5.6413(b) requires the group's notification under proposed new §5.6413(a) to include an explanation of the reason for the cancellation or termination of each member of the group and a statement indicating how the group anticipates addressing the membership loss, including whether or not assessments of the remaining members of the group will be necessary.

FISCAL NOTE. Danny Saenz, Senior Associate Commissioner for the Financial Program, has determined that for each year of the first five years the proposed amendments and new sections will be in effect, there may be an approximate $375 - $750 annual increase in revenue to state government as a result of the enforcement and administration of this proposal due to the estimated additional fingerprint submissions to the Texas Department of Public Safety (DPS). This amount is based on an estimated additional 25 - 50 annual submissions resulting from the proposed fingerprint requirement in proposed amended §5.6403(f) of the proposal and a statutorily authorized $15 fee for each submission collected by the DPS. The Government Code §411.088(a)(2) authorizes the DPS to charge a $15 fee for each criminal history record information inquiry. It is the Department's understanding based on information provided by the DPS that this fee is for the costs of processing the fingerprints and maintaining the records and systems used by the DPS in processing fingerprint submissions. Therefore, additional fingerprint submissions may result in increased costs to the DPS, which may substantially offset or eliminate any additional revenue. It is anticipated that most individuals in the State of Texas will utilize the convenience and reliability offered by the authorized electronic fingerprint services and, as such, the Department estimates that there will be no measurable fiscal impact to local governments from the capture of fingerprints on paper cards by local law enforcement agencies as a result of the enforcement or administration of this proposal. There will be no anticipated effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Mr. Saenz also has determined that for each year of the first five years the proposed amendments and new sections are in effect, there are several anticipated public benefits, and there will be potential costs for persons required to comply with the proposal.

Anticipated Public Benefits. The anticipated public benefits include: a more efficient and standardized process for regulating workers' compensation self-insurance groups (groups) and their delegated entities, resulting in ease of operations and processes for the industry and the Department; increased financial solvency and stability of groups; increased assurance of timely and sufficient payment of workers' compensation benefits for injured Texas workers; increased oversight of a group's delegated entities, resulting in increased accountability for compliance with the Insurance Code, the Labor Code, and regulations adopted thereunder; reduced administrative burdens for groups and their delegated entities with regard to fidelity bond filings, biographical affidavits filings, membership cancellation or termination filings, and storage and maintenance of books and records requirements; protection of a group's members from possible assessments; protection of the Texas Group Self-Insurance Guaranty Association (Association), which protects against the risk of insolvency of groups; protection of the industry against potential Association fund assessments; and more efficient regulation of the industry by ensuring that persons receiving authorizations

from the Department are honest, trustworthy, reliable, and fit to hold those authorizations.

The proposed amended and new sections streamline the application process for applicants and clarify the requirements for groups and their delegated entities. It is anticipated that these necessary clarifications will result in more efficient regulation of the industry and increased compliance with Department regulations. Additionally, the proposed amended and new sections eliminate duplicative administrative requirements where possible, reducing unnecessary filing requirements for the industry. Although, under the proposal, the filing requirements for the industry have been reduced, the Department's ability to effectively regulate the industry will not be negatively affected by the reduction of these filings. To the contrary, the Department anticipates that a group's required filings, although reduced in number, will more accurately and timely identify potentially hazardous financial conditions. This is because the threshold requirements for filing certain notices with the Department have been amended to better correlate with hazardous financial condition indicators. As a result, the required filings should alert the Department of potentially hazardous financial conditions at an earlier point in time, so that appropriate corrective actions may be taken and financial complications may be avoided. Further, it is anticipated that the proposed amended and new sections will allow industry to realize cost savings resulting from reduced fidelity bond requirements and amended requirements related to the storage and maintenance of a group's books and records. Specifically, it is anticipated that groups will be able to take advantage of innovative and cost effective methods of storage and maintenance of their books and records that may be available outside of the State of Texas.

The proposed amended and new sections also require a higher amount of specific excess insurance for each group. It is anticipated that this requirement will enhance a group's solvency and financial stability by insulating the group from potentially devastating catastrophic claims payments. It is also anticipated that this requirement will protect a group's members from possible assessments, the Association, and industry against potential Association fund assessments. Additionally, this requirement is anticipated to further ensure the timely and sufficient payment of compensable workers' compensation claims of injured Texas workers, even where the total cost over the life of the claims is significantly high.

Lastly, the proposed amended and new sections require increased oversight over a group's delegated entities and downstream subcontractors, which should result in increased accountability for compliance with the requirements of the Insurance Code, the Labor Code, and regulations adopted thereunder. Additionally, because the proposed amended and new sections also require certain individuals to submit biographical affidavits and complete sets of fingerprints to the Department upon application for a certificate of authority, it is anticipated that only those persons that are honest, trustworthy, reliable, and fit to hold a certificate of approval from the Department will be granted such authorization. This proposed requirement ensures the safety of the public and the integrity of the workers' compensation system.

Potential Costs for Persons Required to Comply with the Proposal.

Proposed Amended §§5.6403, 5.6405, 5.6408, and 5.6411 and Proposed New §§5.6404, 5.6409, 5.6412, and 5.6413 Requirements for Groups Currently Holding a Certificate of Approval

Under the Labor Code Chapter 407A and this division, unincorporated associations or business trusts composed of five or more private employers may establish a workers' compensation self-insurance group. The proposal prescribes the requirements for applicants applying for a certificate of approval under the Labor Code Chapter 407A and groups holding a certificate of approval under the Labor Code Chapter 407A. No person is required by law to establish a group. However, for those persons that choose to establish a group and who currently hold a certificate of approval from the Department, there will be associated costs of compliance with proposed amended §5.6405 and §5.6411, and proposed new §§5.6404, 5.6409, 5.6412, and 5.6413. There may be additional costs for these groups resulting from compliance with proposed amended §5.6403 and §5.6408, depending upon whether a particular group changes: (i) any of the information filed in its original application for a certificate of approval under the Labor Code §407A.051(c) or proposed amended §5.6403; or (ii) its manner of compliance with the Labor Code §407A.051(c) or proposed amended §5.6403, such as obtaining new fidelity or performance bonds that meet required formatting requirements or amending a group's business plan to correctly identify a newly engaged service company. The Department anticipates that the costs of compliance with proposed amended §5.6403 and §5.6408 will generally be of the same nature for groups holding a certificate of approval under the Labor Code Chapter 407A as for applicants for a certificate of approval under the Labor Code Chapter 407A. The specific anticipated costs associated with complying with proposed amended §5.6403 and §5.6408 are described in the Department's cost analysis in the part of this Public Benefit/Cost note pertaining to potential costs to comply with proposed requirements for Applicants for a Certificate of Approval.

The probable costs associated with proposed amended §5.6405 and §5.6411, and proposed new §§5.6404, 5.6409, 5.6412, and 5.6413 collectively result from notification requirements, maintenance of qualification requirements, contracting requirements, membership cancellation or termination reporting requirements, and from obtaining and maintaining specific excess insurance, backing up, storing, and maintaining books and records, and implementing an operational review plan that provides for sufficient oversight of a group's delegated entities and downstream subcontractors.

Proposed new §5.6404 primarily prescribes notification requirements. Under proposed new §5.6404(a), a group is required to provide written notice to the Department identifying: (i) any change in the information filed by the group under the Labor Code §407A.051(c) and proposed amended §5.6403 (relating to Application for Initial Certificate of Approval); and (ii) any change in the group's manner of compliance with the Labor Code §407A.051(c) and proposed amended §5.6403. Proposed new §5.6404(b) requires a group to meet the requirements of the Labor Code §407A.051(c) and proposed amended §5.6403, as those requirements apply to any change of information identified by the group pursuant to proposed new §5.6404(a). Proposed new §5.6404(c) requires a group to provide written notice to the Department that any hazardous financial condition exists or is likely to occur. Additionally, proposed new §5.6404(d) requires a group to execute a statement acknowledging its responsibilities under proposed new §5.6404. Lastly, proposed new §5.6404(e) requires a group to maintain the qualifications necessary to obtain a certificate of approval under the Labor Code Chapter 407A at all times. The total probable cost of preparing and submitting the information required under proposed new §5.6404(a), (c), or

(d) should be less than $37. This is based upon a member of a group's administrative staff preparing the information necessary to comply with proposed new §5.6404(a), (c), or (d) in less than one hour, at the mean salary rate of $14.13 per hour, as set forth in the May 2007 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm. Additionally, the Department estimates that a member of a group's management staff could review and approve the information prepared by a member of the group's administrative staff in less than thirty minutes, at the mean salary rate of $44.87 per hour, as set forth in the May 2007 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm. The total probable cost to comply with proposed new §5.6404(b) or (e) will vary substantially among groups based upon the business decisions made by individual groups, depending on how often a group chooses to change its manner of compliance with the requirements of the Labor Code Chapter 407A or this division. For example, if a group chooses to change the administrator named in the group's original application for a certificate of authority, the group may incur additional costs in order to meet the requirements of the Labor Code §407A.051(c) and proposed amended §5.6403 related to that specific change, such as the applicable bonding requirements under proposed amended §5.6403(c)(6). However, if a group chooses not to change its administrator, it will incur no such costs. Each group has the information necessary to estimate its own compliance costs. Any other costs for groups to comply with proposed new §5.6404 result from the legislative enactment of the Labor Code Chapter 407A and are not a result of the adoption, enforcement, or administration of the proposal.

Under proposed amended §5.6405(a), a group must obtain specific excess insurance for losses that exceed a group's retention in an amount that will pay all benefits required under the Labor Code and rules adopted thereunder for a compensable claim. The probable costs to comply with this proposed requirement will vary substantially between groups depending upon a group's size, volume, retention level, estimated payroll amount, number of member employers, payroll code classification, concentration of risk, market conditions, risk factors, and prior loss history. Based upon the information submitted to the Department, seven of the eight groups currently holding certificates of approval under the Labor Code Chapter 407A already maintain the level of specific excess insurance required by proposed amended §5.6405(a). Based upon those group's reported annual written premium and estimated excess insurance costs, the Department estimates that the probable cost to comply with proposed amended §5.6405(a) may range from 8.5 percent to 26 percent of a group's annual written premium. Additionally, proposed amended §5.6405(c) permits a group to petition the Department to obtain specific excess insurance in an amount that is different than the amount required under proposed amended §5.6405(a). No group, however, is required to petition the Department under proposed amended §5.6405(c). However, for those groups that choose to utilize the procedure provided by proposed amended §5.6405(c), there will also be associated costs of compliance with proposed amended §5.6405(c) and (d), which collectively require a group to submit an analysis prepared by an actuary of the appropriate level of specific excess insurance for the group. The Department estimates that an actuary can develop an analysis of the appropriate level of specific excess insurance for a group in 12 to 14 hours, at the mean salary rate of $50.61 per hour, as set forth in the May 2007 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm. Additionally, a member of a group's administrative staff could prepare the information necessary to comply with proposed amended §5.6405(c) in less than one hour, at the mean salary rate of $14.13 per hour, as set forth in the May 2007 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm. Additionally, the Department estimates that a member of a group's management staff could review the information prepared by the member of the group's administrative staff in less than one hour, at the mean salary rate of $44.87 per hour, as set forth in the May 2007 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm.

Proposed new §5.6409(b) requires a group's books and records to be located within the United States, but allows a group's books and records to be located outside the State of Texas, provided certain requirements are met. All groups will generally be subject to the requirements of proposed new §5.6409(b), (c), (d), (e), and (f). For groups that choose to locate their books and records outside the State of Texas, there will be additional costs of compliance with proposed new §5.6409(b)(1) - (4). The probable costs for complying with proposed new §5.6409(b), (c), (d), (e), and (f) will vary substantially among groups based upon individual business decisions made by individual groups, including choosing among various backup and storage methods for the group's electronic books and records, such as utilizing in-house storage and maintenance resources or employing an outside vendor to store and maintain the group's books and records. Because the Department considers the requirements in proposed new §5.6409(b), (c), (d), (e), and (f) to be consistent with prudent business practices, the Department does not anticipate that groups will need to make significant changes to their current storage and backup methods, systems, practices, and procedures. For example, certain groups may already have agreements with administrators or other independent vendors that address backup, maintenance, and storage of their books and records. Additionally, because proposed new §5.6409(b), (c), (d), (e), and (f) do not dictate the precise method or manner that must be utilized by a group, each group is free to choose the most economical means of complying with the requirements of proposed new §5.6409(b), (c), (d), (e), and (f). Further, each group has the information necessary to estimate its individual backup, storage, and maintenance needs associated with the requirements of proposed new §5.6409(b), (c), (d), (e), and (f). Lastly, no group is required to locate its books and records outside the State of Texas. However, for those groups that choose to utilize the procedure provided by proposed new §5.6409(b)(1) - (4) to locate their books and records outside of the State of Texas, there may be associated costs of compliance. The Department estimates that a member of a group's administrative staff could prepare the information necessary to comply with proposed new §5.6409(b)(1) - (4) in less than one hour, at the mean salary rate of $14.13 per hour, as set forth in the May 2007 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm. Additionally, the Department estimates that a member of a group's management staff could review the information prepared by the member of the group's administrative staff in less than one hour, at the mean salary rate of $44.87 per hour, as set forth in the May 2007 State Occupational Employment and Wage

Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm. The Department also anticipates that any costs incurred as a result of complying with proposed new §5.6409 may be substantially reduced because a group may choose the most cost effective method for storing and maintaining its books and records, including utilizing vendors that are located outside the State of Texas. The Department anticipates that permitting groups to utilize vendors located outside the State of Texas will provide a group access to additional competitive markets, resulting in more choices and cost savings.

Proposed amended §5.6411(a) requires a group to execute a written agreement with its administrator, third party administrators, and service companies that have management or discretionary decision making authority relating to a function the group retains ultimate responsibility for under the Labor Code, the Insurance Code, or regulations adopted thereunder. Proposed amended §5.6411(c), (d), and (e) prescribes the minimal provisions that must be included in these written agreements. The probable costs associated with these contracting requirements will vary substantially among groups depending upon the number of third party administrators and qualifying service companies a group utilizes; the types of services a group delegates to its administrator, third party administrators, and qualifying service companies; the complexity of a group's business plan or plan of operation; and the existence of any written agreements with a group's administrator, third party administrators, and qualifying service companies. The Department estimates that the total probable cost of complying with proposed amended §5.6411(a), (c), (d), and (e) should be less than $175 per written agreement. This estimate is based upon the following factors. First, existing §5.6411 requires a group to execute a contract with any person the group has engaged to perform a function regulated under the Insurance Code or the Labor Code. Thus, the Department anticipates that each group will already have a written agreement in place with its administrator and any service company or third party administrator that has been engaged by the group to perform a function regulated under the Insurance Code or the Labor Code. Second, proposed amended §5.6411(c), (d), and (e) requires that each written agreement contain only three additional provisions that are not already required under existing §5.6411. Thus, because groups should already have contracts in place with their delegated entities that already contain a portion of the required provisions of proposed amended §5.6411(c), (d), and (e), the Department anticipates that any changes to these existing written agreements that are necessary for compliance with proposed amended §5.6411(c), (d), and (e) should be minimal. The Department anticipates that an attorney could review a group's existing contracts, draft new provisions that comply with proposed amended §5.6411(a), (c), (d), and (e), and finalize these contracts in less than three hours per written agreement, at the mean salary rate of $57.73 per hour, as set forth in the May 2007 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm. Existing §5.6403(c)(11) requires a group to file a business plan with the Department identifying a group's administrator and service companies. Based upon the information included in the business plans of the groups currently holding certificates of approval under the Labor Code Chapter 407A, the Department does not anticipate that groups currently holding a certificate of approval will need to execute many new written agreements with their delegated entities in order to comply with proposed amended §5.6411(a), (c), (d), and (e). This estimate is based upon the fact that, in their business plan filed with the Department, most groups identified one administrator (per group) and a few service companies. However, for the groups that do need to execute new written agreements with their delegated entities in order to comply with proposed amended §5.6411(a), (c), (d), and (e), the Department anticipates that the costs of compliance for each new written agreement should be less than $230 per written agreement. The Department anticipates that an attorney could review a group's business plan, draft new written agreements that comply with proposed amended §5.6411(a), (c), (d), and (e), and finalize these contracts in less than four hours per written agreement, at the mean salary rate of $57.73 per hour, as set forth in the May 2007 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm. Any other costs associated with proposed amended §5.6411 result from the legislative enactment of the Labor Code Chapter 407A and are not a result of the adoption, enforcement, or administration of this proposal.

Proposed new §5.6412(a) requires a group to annually adopt an operational review plan that provides sufficient oversight of a group's delegated entities. Proposed new §5.6412(b) prescribes the elements that must be included in a group's operational review plan, such as a group's estimated projections for each quarter of the group's upcoming fund year and specific reports from a group's delegated entities. Lastly, proposed new §5.6412(c) requires the board of trustees of a group to consider the reports provided by the group's delegated entities and to provide for corrective action, as determined by the board of trustees of the group. The Department does not anticipate these reporting requirements to differ greatly from the reporting requirements already required under existing agreements between groups and administrators, third party administrators, and service companies. From information filed with the Department, agreements between groups and their delegated entities already specify to some degree that the delegated entities provide periodic, monthly, or as-needed reporting to the groups regarding the types of information contemplated under proposed new §5.6412(b)(1) and (2). Thus, the Department anticipates that most groups should already receive the majority of the information required under proposed new §5.6412(b)(1) and (2) or at least have established the contractual right to do so. Overall, however, the probable costs to comply with proposed new §5.6412 will vary significantly among groups depending upon each group's business plan or plan of operation, the number of delegated entities the group has engaged, the amount of information each group is currently collecting from its delegated entities, and whether a group has already established the right to collect certain information from its delegated entities through a written agreement. Each group, however, has the information necessary to estimate its individual compliance needs associated with the requirements of proposed new §5.6412. Lastly, because proposed new §5.6412(c) requires a group to adopt an annual operational review plan, the Department estimates that a group may incur nominal, routine, administrative costs related to drafting and adopting the required annual operational review plan and considering and making recommendations based upon the required reports.

Proposed new §5.6413(a) requires a group to notify the Commissioner pursuant to the Labor Code §407A.201(c) only if the group experiences a reduction in membership, caused by either cancellation or termination, resulting in a cumulative reduction of

10 percent or more of its annual written premium, not later than the 10th day after the date on which the cumulative reduction in membership takes effect. Further, proposed new §5.6413(b) requires the group's notification under proposed new §5.6413(a) to include an explanation of the reason for the cancellation or termination of each member of the group and a statement indicating how the group anticipates addressing the membership loss, including whether or not assessments of the remaining members of the group will be necessary. The probable costs of complying with proposed new §5.6413(a) and (b) should be less than $37. This is based upon a member of a group's administrative staff preparing the information necessary to comply with proposed new §5.6413(b) in less than one hour, at the mean salary rate of $14.13 per hour, as set forth in the May 2007 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm. Additionally, the Department estimates that a member of a group's management staff could review and approve the information prepared by the member of the group's administrative staff in less than thirty minutes, at the mean salary rate of $44.87 per hour, as set forth in the May 2007 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm. Any other costs associated with proposed new §5.6413 result from the legislative enactment of the Labor Code Chapter 407A and are not a result of the adoption, enforcement, or administration of this proposal.

Proposed §§5.6403, 5.6405, 5.6408, and 5.6411 Requirements for Applicants for a Certificate of Approval

The proposal prescribes the requirements for applicants applying for a certificate of approval under the Labor Code Chapter 407A. For those persons applying for a certificate of approval under the Labor Code Chapter 407A and this division, there will be associated costs of compliance with proposed amended §§5.6403, 5.6405, 5.6408, and 5.6411. The primary cost for applicants for a certificate of approval under the Labor Code Chapter 407A results from proposed amended §5.6403, which prescribes the requirements for an application for an initial certificate of approval. Proposed amended §5.6403 generally requires an applicant to provide proof of excess insurance and fidelity and performance bonds, as applicable, at the time of application, as well as copies of certain written agreements. Proposed amended §§5.6405, 5.6408, and 5.6411, which also apply to an applicant for a certificate of approval under the Labor Code Chapter 407A, further prescribe the specific requirements relating to such excess insurance, fidelity and performance bonds, and written agreements. The majority of the requirements of proposed amended §5.6403 are identification, notification, and documentation requirements, such as providing copies of bonds, biographical affidavits, written agreements, indemnity agreements, and acknowledgement forms, and identifying a group's business plan, its delegated entities, and its accountant and actuary. The probable costs for complying with the identification, notification, and documentation requirements of proposed amended §5.6403 should be less than $135. This estimate is based upon the following factors. First, the Department anticipates that a member of a group's administrative staff could prepare the information necessary to comply with the identification, notification, and documentation requirements of proposed amended §5.6403 in less than three hours, at the mean salary rate of $14.13 per hour, as set forth in the May 2007 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm. Additionally, the Department anticipates that a member of a group's management staff could review and approve the information prepared by the member of the group's administrative staff in less than two hours, at the mean salary rate of $44.87 per hour, as set forth in the May 2007 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm. Proposed amended §5.6403(c)(12) specifically requires a group to also submit a business plan or plan of operation that describes the group's business activities, safety program, and organization. A group's business plan will vary substantially from group to group based upon the size of the group, the complexity of the group's business, the number and identity of the initial employer members, types and risks insured, and the number and type of the group's delegated entities. The probable costs associated with complying with proposed amended §5.6403(c)(12) are anticipated to be between $1,158 - $1,247. This is based on the Department's anticipation that a knowledgeable member of a group's management staff could properly prepare the portions of a group's business plan or plan of operation that relates to the identification and description of the group's organization, business activities, and safety program in 10-12 hours, at the mean salary rate of $44.87 per hour, as set forth in the May 2007 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm. Additionally, the Department estimates that an actuary could prepare the appropriate financial statements related to the group's business plan in less than 14 hours, at the mean salary rate of $50.61 per hour, as set forth in the May 2007 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm. Further, proposed amended §5.6403(f) requires each member of the initial board of trustees of a group, subsequent members of the board of trustees of a group, and the executive officers of a group's administrator, third party administrators, and qualifying service companies to comply with the requirements of Chapter 1, Subchapter D of this title (relating to Effect of Criminal Conduct), including submitting a complete set of fingerprints and certain identifying information to a person identified under §1.509 of this title (Relating to Fingerprint Format and Complete Application). The Department estimates that the probable costs of complying with proposed amended §5.6403(f) should be $45 - $55. The Department has been informed by the FBI and DPS that each individual who must provide fingerprints under §1.503(a)(2) of this title (relating to Application of Fingerprint Requirement) must pay a fingerprinting fee of $34.25. The $34.25 fingerprinting processing fee includes an FBI charge of $19.25 and a DPS charge of $15. Additionally, there is a $9.95 fingerprint collection fee charged by companies that take electronic fingerprints on behalf of the Department. While the Department anticipates that most individuals in the State of Texas will utilize the convenience and reliability offered by authorized electronic fingerprint services, an individual may choose to submit a paper fingerprint card instead of an electronic fingerprint submission. In those cases, the individual must submit payment in the amount of $44.20 payable to the DPS, which includes the fingerprinting processing fee of $34.25 and the fingerprint collection fee of $9.95. Additionally, if an individual has his or her fingerprints captured on a paper fingerprint card by a criminal law enforcement agency, the Human Resources Code §80.001(b) authorizes a charge for such service in an amount not to exceed $10. Lastly, any additional information that must be supplied by an individual

at the time of fingerprinting is minimal, and the Department does not anticipate an associated cost with providing such required information. Further, the Department anticipates that an individual or applicant should only have to submit a complete set of fingerprints under the proposed amendments one time, so long as the applicant maintains continuous licensure with the Department. An applicant for a certificate of approval under the Labor Code Chapter 407A must also comply with the requirements of proposed amended §§5.6405, 5.6408, and 5.6411, as those sections are incorporated into the requirements of proposed amended §5.6403. The specific costs associated with complying with proposed amended §5.6405 and §5.6411 are described in the Department's cost analysis in the part of this Public Benefit/Cost Note pertaining to potential costs to comply with proposed requirements for Groups Currently Holding a Certificate of Approval. The probable costs associated with compliance with proposed amended §5.6408 will vary among groups based upon the total number of a group's delegated entities subject to proposed amended §5.6408 and upon the individual business decisions made by each group related to the payment of its delegated entities' bonds. Although an applicant for a certificate of approval under the Labor Code Chapter 407A is required under proposed amended §5.6403(c)(6), (7), and (8) to submit a fidelity or performance bond on behalf of its administrator and service companies, including a service company performing claims services on behalf of the group, a group may choose to either pay for those bonds directly or to require its delegated entities to obtain and pay for those bonds. Based upon the information available to the Department, the Department estimates that the cost of a fidelity bond for an administrator or service company meeting the requirements of proposed amended §5.6408(a) and (d) should be between $150 - $550 per entity and that the cost of a performance bond for a service company performing claims services on behalf of a group meeting the requirements of proposed amended §5.6408(b), (c), and (d) should be between $150 - $300 per entity. Additionally, the Department estimates that the probable costs associated with compliance with proposed amended §5.6408(e) should be less than $37. This is based upon a member of a group's administrative staff preparing the information necessary to comply with proposed amended §5.6408(e) in less than one hour, at the mean salary rate of $14.13 per hour, as set forth in the May 2007 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm. Additionally, the Department anticipates that a member of a group's management staff could review and approve the information prepared by the member of the group's administrative staff in less than thirty minutes, at the mean salary rate of $44.87 per hour, as set forth in the May 2007 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm. Any other costs associated with proposed amended §5.6403 and §5.6408 result from the legislative enactment of the Labor Code Chapter 407A and are not a result of the adoption, enforcement, or administration of this proposal.

Once an application for a certificate of approval under the Labor Code Chapter 407A is approved by the Department, there will also be additional costs resulting from compliance with proposed amended §5.6405 and §5.6411 and proposed new §§5.6404, 5.6409, 5.6412, and 5.6413. The Department anticipates that the costs of compliance with proposed amended §5.6405 and §5.6411 and proposed new ,§§5.6404, 5.6409, 5.6412, and 5.6413 will be the same for applicants newly granted a certificate of approval under the Labor Code Chapter 407A as for groups holding a certificate of approval under the Labor Code Chapter 407A. The specific costs associated with complying with proposed amended §5.6405 and §5.6411, and proposed new §§5.6404, 5.6409, 5.6412, and 5.6413 are described in the Department's cost analysis in the part of this Public Benefit/Cost Note pertaining to potential costs to comply with proposed requirements for Groups Currently Holding a Certificate of Approval.

Proposed Amended §§5.6403, 5.6408, and 5.6411, and Proposed New §5.6412 Requirements for Administrators, Qualifying Service Companies, Third Party Administrators, and Downstream Subcontractors

A group's delegated entities and their downstream subcontractors may incur costs associated with compliance with proposed amended §§5.6403, 5.408, and 5.6411, and proposed new §5.6412. Proposed amended §5.6403(c)(6), (7), and (8), (e), and (f) collectively require a group's delegated entities and their downstream subcontractors to obtain fidelity or performance bonds, as applicable, and to submit biographical affidavits to the Department and a complete set of fingerprints to a person identified under §1.509 of this title. The Department anticipates that the costs of compliance with proposed amended §5.6403(c)(6), (7), and (8), (e), and (f) and §5.6408 will be the same for a group's delegated entities and downstream subcontractors as for applicants for a certificate of approval under the Labor Code Chapter 407A. The specific costs associated with complying with proposed amended §5.6403 and §5.6408 are described in the Department's cost analysis in the part of this Public Benefit/Cost Note pertaining to potential costs to comply with proposed requirements for Applicants for a Certificate of Approval. If a group's administrator, third party administrators, or qualifying service companies further delegate any of their management or discretionary decision making authority relating to a function the group retains ultimate responsibility for under the Labor Code, the Insurance Code, or regulations adopted thereunder to another administrator, third party administrator, or qualifying service company, proposed amended §5.6411(b) requires a written agreement to be executed. Proposed amended §5.6411(c), (d), and (e) also prescribe the minimal provisions that must be included in such written agreements. The probable costs for complying with proposed amended §5.6411(b), (c), (d), and (e) will vary substantially among delegated entities and downstream subcontractors, depending upon the number of times a particular function is delegated, who a particular function is delegated to, the complexity of a delegated entity's plan of operation; and whether a delegated entity already has existing written agreements with its downstream subcontractors. For those delegated entities that already have existing written agreements with their downstream subcontractors, the Department anticipates that an attorney could review those written agreements, draft new provisions that comply with proposed amended §5.6411(b), (c), (d), and (e), and finalize those contracts in less than three hours per written agreement, at the mean salary rate of $57.73 per hour, as set forth in the May 2007 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm. For those delegated entities who will need to execute a new written agreement with one of their delegated entities in order to comply with proposed amended §5.6411(b), (c), (d), and (e), the Department anticipates that the costs of preparing a new written agreement should be less than $230 per written agreement. The Department anticipates that an attorney could draft

a new written agreement that complies with proposed amended §5.6411(b), (c), (d), and (e) and finalize each agreement in less than four hours, at the mean salary rate of $57.73 per hour, as set forth in the May 2007 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm. Lastly, proposed new §5.6412(b) requires a group's operational review plan to require the group's delegated entities and their downstream subcontractors to submit quarterly reports to the group regarding specified information. As discussed previously in this cost note, the Department does not anticipate the reporting requirements of proposed new §5.6412(b) to differ greatly from the reporting requirements already required under existing agreements between groups and their delegated entities and downstream subcontractors. Agreements between groups and their delegated entities already specify to some degree that the delegated entities provide periodic, monthly, or as-needed reporting to the groups regarding the types of information contemplated under proposed new §5.6412(b)(1) and (2). Thus, the Department anticipates that most delegated entities already provide groups with the majority of the information required under proposed new §5.6412(b)(1) and (2) or that they are at least contractually obligated to do so. Overall, however, the probable costs to comply with proposed new §5.6412 will vary significantly among each delegated entity and downstream subcontractor depending upon each entity's business plan or plan of operation, the number of groups each entity performs functions on behalf of, the types of functions each entity performs, the amount of information each entity is currently providing to each group it performs functions on behalf of, and whether a group has already established the right to collect certain information from that entity through a written agreement. Each entity, however, has the information necessary to estimate its individual compliance needs associated with the requirements of proposed new §5.6412(b). Additionally, the Department anticipates that a delegated entity or downstream subcontractor will pass on any costs associated with the reporting requirements of proposed new §5.6412(b) to each group the entity performs functions on behalf of, thereby significantly decreasing that entity's compliance costs. Any other costs associated with proposed amended §§5.6403, 5.6408, and 5.6411 and proposed new §5.6412 result from the legislative enactment of the Labor Code Chapter 407A and are not a result of the adoption, enforcement, or administration of this proposal.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES.

Workers' Compensation Self-Insurance Groups (Groups) Currently Holding a Certificate of Approval under the Labor Code Chapter 407A and Applicants for a Certificate of Approval under the Labor Code Chapter 407A

As required by the Government Code §2006.002(c), the Department has determined that the proposal will not have an adverse economic effect on any workers' compensation self-insurance group currently holding a certificate of approval under the Labor Code Chapter 407A or any applicant for a certificate of approval under the Labor Code Chapter 407A because neither a group nor any applicant will meet the definition of a small business under the Government Code §2006.001(2). The Government Code §2006.001(2) defines a small business as a legal entity, including a corporation, partnership, or sole proprietorship, that: (i) is formed for the purpose of making a profit; (ii) is independently owned and operated; and (iii) has fewer than 100 employees or less than $6 million in annual gross receipts. Each of these elements must be met in order for an entity to qualify as a small business under this section. However, neither a group nor an applicant will be able to meet the second requirement because neither a group nor an applicant can be independently owned and operated. Generally, independently owned and operated businesses are self-controlling entities that are not subsidiaries of other entities, are not otherwise subject to control by other entities, and are not publicly traded. Eight groups currently hold certificates of approval under the Labor Code Chapter 407A, and there are no applications currently on file with the Department for a certificate of approval under the Labor Code Chapter 407A. Accordingly, the Department anticipates that no more than two applications for a certificate of approval under the Labor Code Chapter 407A will be submitted to the Department annually.

The Labor Code Chapter 407A permits an unincorporated association or business trust composed of five or more private employers to establish a workers' compensation self-insurance group. Under this arrangement, individual employers may enter into an agreement to pool their liabilities for workers' compensation benefits and employers' liability in this state. Pursuant to the Labor Code §407A.151, each group must be operated by a board of trustees composed of at least five persons whom the members of the group elect for stated terms of office. The trustees must be employees, officers, or directors of employers who are members of the group. Because a group may only act through its board of trustees, the Department has determined that a group is not independently owned and operated or self controlling because it is necessarily subject to the control of other entities, namely its individual employer members. These individual employer members retain their individual status as individual entities. It is these individual entities that control the group. A group is not self controlling or subject to the independent control of only one employer member; rather, it is subject to the collective will of each of its individual employer members, who act through the elected board of trustees. As such, a group will always be subject to the collective control of its individual employer members. Because neither a group nor an applicant will meet the requirements of the Government Code §2006.001(2)(B), neither a group nor an applicant will be a small business under the Government Code §2006.001(2).

Administrators, Qualifying Service Companies, Third Party Administrators, and Downstream Subcontractors. As required by the Government Code §2006.002(c), the Department has determined that between 24 and 48 administrators, qualifying service companies, third party administrators, and downstream subcontractors will be subject to the proposal and may qualify as small or micro businesses under the Government Code §2006.001. No small or micro business is required by law to provide services to or on behalf of a group or to comply with the proposal. However, as required by the Government Code §2006.002(c), the Department has determined that the proposal may have an adverse economic effect on those small or micro businesses who choose to do so. Adverse economic impact may result from costs associated with fidelity or performance bond requirements, fingerprinting requirements, contracting requirements, and certain reporting requirements. The Department's cost analysis and resulting estimated costs in the Public Benefit/Cost Note portion of this proposal pertaining to Potential Costs to Comply With Proposed Requirements for Administrators, Qualifying Service Companies, Third Party Administrators, and Downstream Subcontractors is equally applicable to these small or micro businesses.

In accordance with the Government Code §2006.002(c-1), the Department has determined that even though proposed amended §§5.6403, 5.6408, and 5.6411 and proposed new §5.6412 may have an adverse economic effect on small or micro businesses that are required to comply with these proposed requirements, the Department is not required to prepare a regulatory flexibility analysis as required in §2006.002(c)(2) of the Government Code. Section 2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on small businesses, to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Section 2006.002(c-1) of the Government Code requires that the regulatory flexibility analysis "consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses." Therefore, an agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small and micro businesses, would not be protective of the health, safety, and environmental and economic welfare of the state.

The general purpose of the Labor Code Chapter 407A is to allow employers, such as those in high risk industries, to form groups to pool their liabilities for workers' compensation benefits and employers' liability in this state. In permitting the formation of these groups, the Labor Code Chapter 407A also emphasizes the need for the groups to remain solvent and financially healthy and for workers' compensation benefits to be available on a timely basis. In order to accomplish these purposes, the Labor Code Chapter 407A prescribes specific financial, reporting, bonding, and licensing requirements applicable to groups and their delegated entities, such as administrators, service companies, and third party administrators. The Labor Code §407A.009 prescribes licensing requirements applicable to a group's administrator and service companies performing the acts of an administrator, as that term is defined in the Insurance Code Chapter 4151. The Labor Code §407A.051(e) directs the Commissioner to evaluate the financial information provided by a group with its application for a certificate of approval under the Labor Code Chapter 407A as necessary to ensure that the funding is sufficient to cover expected losses and expenses and the funds necessary to pay workers' compensation benefits will be available on a timely basis. Further, the Labor Code §407A.051(c)(12) and (13) and §407A.057 require a group's administrator and service companies to obtain fidelity and performance bonds. The common purpose of these requirements is to ensure a group's financial health, to ensure sufficient funding to cover expected losses and expenses, to ensure sufficient funding to pay workers' compensation benefits for injured Texas workers, and to ensure proper accountability and regulation of a group's delegated entities.

The purpose of proposed amended §§5.6403, 5.6408, and 5.6411 and proposed new §5.6412 is to protect the health, safety, and economic welfare of injured Texas workers and the state of Texas generally by: (i) ensuring that persons performing delegated functions on behalf of groups are honest, trustworthy, and reliable and have sufficient experience, ability, standing, and good record to make success of the group probable; (ii) ensuring increased accountability and compliance with the requirements of the Insurance Code, the Labor Code, and regulations adopted thereunder; (iii) ensuring that workers' compensation benefits are available on a timely basis and in a sufficient amount; (iv) ensuring each group's general financial health; and (v) ensuring greater protection of a group's members from financial harm that may arise from assessments that an individual group may be required to levy on its own members to fulfill the group's obligations; and (vi) ensuring greater protection of all members of all groups from financial harm that may arise from the Texas Group Self-Insurance Guaranty Association (Association) assessments that may be required to be levied on all groups due to the insolvency of any one group.

The proposal requires the executive officers of a group's delegated entities to submit biographical affidavits to the Department and to submit complete sets of fingerprints. Because a group's delegated entities often have control over or access to a group's financial accounts, claims files, books and records, and premium and contribution collections, it is important that these entities are honest, trustworthy, reliable, and have the necessary qualifications to make the success of the group probable. By requiring the key personnel of a group's delegated entities to submit their fingerprints and criminal history to the Department, the Department is better able to protect the interests of the public, the interests of injured Texas workers, and the integrity of the worker's compensation system. Further, the proposal implements the statutory bond requirements of the Labor Code Chapter 407A for a group's delegated entities. This added security provides groups with an additional safeguard in the event that one of their delegated entities does not properly execute its delegated functions. If needed, this added security should provide a group with the necessary tools to remedy the situation, especially where the payment of injured Texas workers' compensation benefits are involved. The proposal also requires a group to enter into written agreements with its delegated entities and, in certain circumstances, for those delegated entities to enter into written agreements with their downstream subcontractors. These proposed contracting requirements help ensure that all parties understand their responsibilities and obligations with respect to delegated functions and establish a group's expectations related to the performance of a delegated duty. It is especially important for groups to properly oversee their delegated entities because a group retains ultimate responsibility and accountability for all delegated functions under the Labor Code, the Insurance Code, or regulations adopted thereunder. The more times that a particular function is delegated from one entity to another, the greater the risk of non-performance or inadequate performance of that function becomes. The proposed requirements are necessary to protect the interests of injured Texas workers by ensuring that workers' compensation claims are handled appropriately and paid timely, regardless of whether a group engages the services of a delegated entity or performs the required functions itself. Additionally, the proposal requires the ownership and possession of a group's books and records to be addressed in each written agreement. This is particularly important because a group's delegated entities will have access to or control of a group's books and records at various times. Because a group cannot comply with the requirements of the Insurance Code or the Labor Code with regard to the payment of workers' compensation benefits without knowing which of its claims has been paid or which of its claims remain outstanding, a group must have continuing access to its books and records, even if they are physically in the possession of one of its delegated entities. Additionally, a group may be placed in financial risk if it is unable to access its financial books and records as necessary. The proposed requirements are necessary to prevent situations where a group would be denied continuous access to its own books and records. Lastly, the proposal requires

a group's delegated entities and their downstream subcontractors to submit various quarterly reports to the group. Requiring the submission of this information is paramount in enabling a group to better assess its ability to meet its obligations under the Labor Code, the Insurance Code, and regulations adopted thereunder on a regular basis. Additionally, a group's regular review of the required information will enable the group to foresee potential financial problems or solvency issues at a much earlier date, so that corrective action can be taken immediately. By regularly monitoring and overseeing its delegated entities and their downstream subcontractors, a group will obtain a better idea of its own capabilities, strengths, and weaknesses, which should result in financially healthier groups and a healthier workers' compensation system. The proposed requirements, both individually and collectively, will also provide greater protection of a group's members from financial harm that may arise from assessments that an individual group may be required to levy on its own members to fulfill the group's obligations. These proposed requirements will also provide greater protection of all members of all groups from financial harm that may arise from Association assessments that may be required to be levied on all groups due to the insolvency of any one group.

Therefore, the Department has determined, in accordance with §2006.002(c-1) of the Government Code, that because the purpose of proposed amended §§5.6403, 5.6408, and 5.6411, and proposed new §5.6412 and the authorizing statutes of the Labor Code and the Insurance Code is to protect the health, safety, and economic welfare of injured Texas workers and the state of Texas, there are no additional regulatory alternatives to the proposed requirements that will sufficiently protect the health, safety, and economic interests of injured Texas workers and the welfare of the state.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on August 25, 2008, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be simultaneously submitted to Danny Saenz, Senior Associate Commissioner for the Financial Program, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The proposed amendments and new sections are proposed under the Labor Code §§407A.001, 407A.002, 407A.005, 407A.008, 407A.009, 407A.051, 407A.052, 407A.054, 407A.056, 407A.057, 407A.201, 407A.252, 407A.355, 407A.455, and the Insurance Code §36.001. The Labor Code §407A.001 defines *administrator, Commissioner, Department, group, managing company, modified schedule rating premium, same or similar, and service company.* The Labor Code §407A.002 provides that an unincorporated association or business trust composed of five or more private employers may establish a workers' compensation self-insurance group under the Labor Code Chapter 407A, provided certain stated conditions are met. The Labor Code §407A.005 requires an association of employers to hold a certificate of approval issued under the Labor Code Chapter 407A in order to act as a workers' compensation self-insurance group. The Labor Code §407A.008 provides that the Commissioner shall adopt rules as necessary to implement the Labor Code Chapter 407A. The Labor Code §407A.009 requires an administrator or service company under the Labor Code Chapter 407A that performs the acts of an administrator as defined in the Insurance Code Chapter 4151 to hold a certificate of authority under the Insurance Code Chapter 4151. The Labor Code §407A.051(a) requires an association of employers that proposes to organize as a workers' compensation self-insurance group to file an application for a certificate of approval with the Department. Additionally, the Labor Code §407A.051(b) and (c) enumerates the particular items that must be included in an applicant's application for a certificate of approval. The Labor Code §407A.051(d) requires a group to notify the Commissioner of any change in the information required to be filed under the Labor Code §407A.051(c) or the manner of a group's compliance with the Labor Code §407A.051(c). Finally, the Labor Code §407A.051(e) specifically requires the Commissioner to evaluate the financial information provided with the application as necessary to ensure that the funding is sufficient to cover expected losses and expenses and that the funds necessary to pay workers' compensation benefits will be available on a timely basis. The Labor Code §407A.052 requires the Commissioner to issue a certificate of approval to a proposed group on finding that the group has met the requirements of the Labor Code Chapter 407A Subchapter B. The Labor Code §407A.054 requires a group to obtain specific excess insurance for losses that exceed the group's retention in a form prescribed by the Commissioner. Additionally, the Labor Code §407A.054 provides that the Commissioner may establish minimum requirements for the amount of specific excess insurance based on differences among groups in size, types of employment, years in existence, and other relevant factors. The Labor Code §407A.056 requires an indemnity agreement filed by a group pursuant to the Labor Code §407A.051 to jointly and severally bind the group and each employer who is a member of the group to meet the workers' compensation obligations of each member. Additionally, the indemnity agreement must be in the form prescribed by the Commissioner and must include minimum uniform substantive provisions as prescribed by the Commissioner. Subject to the Commissioner's approval, a group may add other provisions necessary because of that group's particular circumstances. The Labor Code §407A.057 provides that, in addition to the requirements under the Labor Code §407A.051, the Commissioner may require a service company providing claim services to furnish a performance bond of $250,000 in the form prescribed by the Commissioner. The Labor Code §407A.201(c) requires the group to notify the Commissioner and the Commissioner of Workers' Compensation of the cancellation of termination of a membership not later than the 10th day after the date on which the cancellation or termination takes effect. The Labor Code §407A.252 provides that the Commissioner shall examine the financial condition of each group to determine the group's ability to meet the group's obligations under the Labor Code Title 5 Subtitle A. Additionally, the Labor Code §407A.252 provides that the Commissioner shall have full access to the records, officers, agents, and employees of a group as necessary to complete an examination

under the Labor Code §407A.252. The Labor Code §407A.355 defines *insolvent.* Additionally, this section also provides that if the Commissioner determines that the group is in a hazardous financial condition, the Commissioner may take action as provided by the Insurance Code Article 21.28-A. The Labor Code §407A.455 provides that the Texas Self-Insurance Group Guaranty Fund shall provide recommendations to the Commissioner regarding rules or guidelines applicable to groups. The Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: §§407A.001, 407A.002, 407A.005, 407A.008, 407A.009, 407A.051, 407A.052, 407A.054, 407A.056, 407A.057, 407A.201, 407A.252, 407A.355, and 407A.455.

§5.6401. Purpose and Scope.

This division establishes the licensing, contracting, reporting, and financial requirements, procedures, responsibilities, and obligations applicable to applicants and workers' compensation self-insurance groups holding a certificate of approval issued under the Labor Code Chapter 407A.

§5.6402. Definitions.

(a) The following words and terms, when used in this division, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Actuary--A member in good standing of the Casualty Actuarial Society or a member in good standing of the American Academy of Actuaries who has been approved as qualified for signing casualty loss reserves opinions by the Casualty Practice Council of the American Academy of Actuaries.

(2) Administrator--An individual, partnership, or corporation engaged by the board of trustees of a group to implement the policies established by the board of trustees and to provide day-to-day management of the group, as defined in the Labor Code §407A.001(a)(1). Day-to-day management may include, but is not limited to, claims adjustment; safety engineering; compilation of statistics and the preparation of premium, loss, and tax reports; preparation of other required self-insurance reports; development of members' assessments and fees; and administration of a claim fund. For purposes of this division, administrator includes and has the same meaning as managing company, as that term is defined in the Labor Code §407A.001(a)(5-a). Any reference to the term administrator in this division in all contexts necessarily includes and references both administrator and managing company.

(3) Books and Records--All books, accounts, records, documents, written agreements, contracts, papers, correspondence, claims files, receipts, bills, notes, pleadings, investigatory files, or any other written or electronic material relating to the business of a group.

(4) Certified Public Accountant--An accountant or firm in good standing with the American Institute of Certified Public Accountants and the Texas State Board of Public Accountancy and who conforms to the Code of Professional Ethics of the American Institute of Certified Public Accountants.

(5) Commissioner--The Commissioner of Insurance.

(6) Department--The Texas Department of Insurance.

(7) Group--An unincorporated association or business trust composed of five or more private employers that meet all of the requirements of the Labor Code Chapter 407A and this division.

(8) Managing company--As defined in paragraph (2) of this subsection.

(9) Modified schedule rating premium--As defined in the Labor Code §407A.001(a)(6).

(10) Person--An individual, partnership, corporation, organization, government or governmental subdivision or agency, business trust, estate trust, association, or any other legal entity.

(11) Same or similar--As set forth in the Labor Code §407A.001(a)(7).

(12) Service company--A person that directly or indirectly provides services to or on behalf of a group, other than the services provided by an administrator, including, but not limited to:

(A) claims adjustment;

(B) safety engineering;

(C) compilation of statistics and the preparation of premium, loss, and tax reports;

(D) preparation of other required self-insurance reports;

(E) development of members' assessments and fees; and

(F) administration of a claim fund.

(13) Third party administrator--An administrator or service company, as those terms are defined under this division, that holds itself out or acts as an administrator, as that term is defined in the Insurance Code §4151.001(1).

(b) A group shall engage only one administrator to implement the policies established by the board of trustees and to provide day-to-day management of the group. A group may engage more than one service company to provide services to the group.

(c) An individual, partnership, or corporation may act as an administrator for more than one group.

(d) An individual, partnership, or corporation may act as an administrator for one group and as a service company for another group.

(e) An individual, partnership, or corporation may not act as both an administrator and a service company for the same group at the same time.

§5.6403. Application for Initial Certificate of Approval.

(a) An unincorporated association or business trust composed of five or more private [~~of~~] employers that proposes to organize as a workers' compensation self-insurance group shall file with the department an application for a certificate of approval.

(b) (No change.)

(c) In addition to the information required under subsection (b) of this section, an applicant shall also [~~must~~] provide the following:

(1) - (5) (No change.)

(6) A fidelity [~~performance~~] bond for an [~~the~~] administrator in the amount of $250,000. The fidelity bond must meet the requirements of §5.6408 of this division (relating to Fidelity and Performance Bonds). [~~If the administrator serves as the service company, the bond shall be in the amount of $500,000. The bond shall be in the form prescribed in §5.6408 of this title (relating to Performance Bonds).~~]

(7) A fidelity [performance] bond for a [the] service company identified pursuant to paragraph (12)(A) or (B) of this subsection, if there is one, in the amount of $250,000. The fidelity bond must meet the requirements of §5.6408 of this division. [The bond shall be in the form prescribed in §5.6408 of this title.]

(8) A performance bond for a service company identified pursuant to paragraph (12)(A) of this subsection that provides claims service to or on behalf of a group, if there is one, in the amount of $250,000. This performance bond is in addition to the fidelity bond required in paragraph (7) of this subsection for a service company. The performance bond shall be in the form prescribed in §5.6408 of this division.

(9) [(8)] An indemnity agreement executed by the members of the group binding [indemnifying] the members, jointly and severally, for the obligations of the group. At a minimum, the agreement shall include the provisions described in §5.6406 of this division [title] (relating to Indemnity Agreement).

(10) [(9)] An acknowledgement, in the form prescribed in §5.6407 of this division [title] (relating to Acknowledgement of Indemnity Agreement), executed by each member of the group that it is aware that it can be called upon to pay the workers' compensation claims of another member of the group pursuant to the Labor Code Chapter 407A [as a result of executing the indemnity agreement in §5.6406 of this title].

(11) [(10)] The statement required by §5.6404 of this division [title] (relating to Notification to the Department and Responsibility for Continued Compliance).

(12) [(11)] A business plan or plan of operation that describes the group's [general] business activities, safety program, and organization. The plan must also include:

(A) the identity of the administrator of the group and any third party administrator that provides services to or on behalf of the group;[, service companies, risk manager, accountant and actuary.]

(B) the identity of any service company that has management or discretionary decision making authority relating to a function the group retains ultimate responsibility for under the Labor Code, the Insurance Code, or regulations adopted thereunder;

(C) the identity of the accountant and actuary of the group;

(D) a general description of the experience, qualifications, facilities, and personnel of a person identified pursuant to subparagraph (A) or (B) of this paragraph; and

(E) the identity of the affiliates of a person identified pursuant to subparagraph (A) or (B) of this paragraph. A group may identify such affiliates in an organizational chart.

(13) A copy of each written agreement required under §5.6411 of this division (relating to Contract Provisions).

(14) A statement that a third party administrator identified pursuant to paragraph (12)(A) of this subsection either holds the required authorization from the department or has applied for the required authorization from the department and that the group will verify that such authorization has been granted by the department before the group allows the third party administrator to provide services to or on behalf of the group.

(d) (No change.)

(e) Each member of the initial board of trustees of a group, subsequent members of the board of trustees of a group, and the [chief] executive officers [officer, president, secretary, treasurer, chief financial officer and controller] of a person identified pursuant to subsection (c)(12)(A) or (B) of this section [the administrator and any service company] shall provide to the department a completed biographical affidavit [adopted by reference under §7.507(b) of this title (relating to Forms Incorporated by Reference)]. A biographical affidavit is not required if a biographical affidavit from the individual has been filed with the department within the prior three years and contains substantially accurate information. A biographical affidavit contains substantially accurate information if the responses given by the individual in the affidavit on file with the department continue to indicate sufficient experience, ability, standing, and good record to make success of a group probable. [when a person has one on file with the department.]

(f) Each member of the initial board of trustees of a group, subsequent members of the board of trustees of a group, and the [chief] executive officers [officer, president, secretary, treasurer, chief financial officer and controller] of a person identified pursuant to subsection (c)(12)(A) or (B) of this section [the administrator and any service company] shall comply with the requirements of Chapter 1[,] Subchapter D of this title (relating to Effect of Criminal Conduct).

(g) A person subject to this division and to the requirements of the Insurance Code §4151.055 may satisfy the requirements of §4151.055 by obtaining a fidelity bond that meets the requirements of subsection (c)(6) or (7) of this section, as applicable.

(h) Pursuant to the Labor Code §407A.051(b)(7), the commissioner may require the submission of any other relevant information deemed necessary in determining whether to approve or disapprove an application for a certificate of approval.

§5.6404. Notification to the Department and Responsibility for Continued Compliance.

(a) No later than 30 days after the effective date of the change, a group shall provide written notice to the department identifying:

(1) any change in the information filed by the group under the Labor Code §407A.051(c) and §5.6403 of this division (relating to Application for Initial Certificate of Approval); and

(2) any change in the group's manner of compliance with the Labor Code §407A.051(c) and §5.6403 of this division.

(b) A group must meet the requirements of the Labor Code §407A.051(c) and §5.6403 of this division as those requirements apply to any change of information identified by a group pursuant to subsection (a) of this section.

(c) A group shall provide written notice to the department no later than 10 days of first becoming aware that any hazardous financial condition exists, or that, in the opinion of its administrator, any hazardous financial condition is likely to occur. For purposes of this subsection only, hazardous financial conditions include the conditions described in the Labor Code §407A.355(a) and (b) and any event, series of events, or negative trend that may affect the group's ability to continue as a viable group.

(d) A group shall acknowledge its responsibilities under this section by executing a statement that it will meet the notification requirements of subsections (a) and (c) of this section and filing it with the department.

(e) A group is required to maintain the qualifications necessary to obtain a certificate of approval issued under the Labor Code Chapter 407A at all times.

§5.6405. Excess Insurance.

(a) Unless otherwise approved by the commissioner, a [The] group shall obtain excess insurance for losses that exceed a group's re-

tention in an amount that will pay all benefits required under the Labor Code and rules adopted thereunder for a compensable claim [~~acceptable to the Commissioner but in no event shall the excess insurance coverage be less than $5 million per occurrence~~].

(b) (No change.)

(c) A group may petition the department to obtain excess insurance in an amount that is different than the amount required by subsection (a) of this section. In determining whether to grant a group's petition [~~the group's excess insurance~~], the commissioner [~~Commissioner~~] shall consider the current market conditions; a group's size, types of employment, years in existence, and risk exposure; other forms, if any, of additional financial security available to the group; and any other relevant factor [~~factors~~]. In no event, however, shall a group's excess insurance coverage be less than $10 million per occurrence.

(d) To assist the commissioner [~~Commissioner~~] in making the determination under subsection (c) of this section, the group shall, at a minimum, submit an analysis prepared by an actuary of the appropriate level of specific excess insurance for the group.

§5.6408. Fidelity and Performance Bonds.

(a) Fidelity bonds [~~Performance Bonds~~] required of an [~~the~~] administrator under the Labor Code §407A.051(c)(12) and a [~~the~~] service company under the Labor Code §407A.051(c)(13) must protect against an act of fraud or dishonesty by the administrator or service company in exercising its powers and duties as an administrator or service company and shall be made payable to the group.

(b) A performance bond required of a service company providing claims services to or on behalf of a group shall be in substantially the form set forth in subsection (c) [~~(b)~~] of this section.

(c) [~~(b)~~] A [~~The~~] performance bond required under the Labor Code §407A.057(a) shall contain the following text and shall be in the following format [~~is as follows~~]:
Figure: 28 TAC §5.6408(c)
[~~Figure: 28 TAC §5.6408(b)~~]

(d) Administrators and service companies may only obtain a fidelity or performance bond from a surety company authorized to engage in business in this state as a surety or an eligible surplus lines insurer in compliance with the Insurance Code Chapter 981 and regulations adopted thereunder.

(e) An administrator or service company that has a fidelity or performance bond cancelled or terminated and not replaced with new coverage that meets the requirements of the Labor Code Chapter 407A and this division and that is effective concurrently upon the date of the cancellation or termination shall:

(1) immediately inform the commissioner in writing, which in no event shall be later than five business days from the date the administrator or service company first becomes aware of the cancellation or termination; and

(2) immediately inform the group in writing, which in no event shall be later than five business days from the date the administrator or service company first becomes aware of the cancellation or termination.

§5.6409. Books and Records.

(a) Except as otherwise provided in this division, this section applies to all books and records of a group, regardless of whether the books and records are located in the State of Texas or outside the State of Texas.

(b) A group's books and records must be located within the United States of America and its territories at all times, but may be located outside the State of Texas, provided that the group provides prior written notice to the department that:

(1) provides the specific address outside the State of Texas where the group's books and records will be located;

(2) identifies the types of books and records that will be located outside the State of Texas, including those that will be maintained in an electronic format;

(3) if applicable, identifies the vendor of a leased or purchased software or electronic platform who will provide services to the group related to the maintenance of the group's books and records; and

(4) if applicable, includes the group's continuity plan in the event of cancellation or termination of the arrangement with a vendor identified by the group pursuant to paragraph (3) of this subsection.

(c) All books and records of a group shall be:

(1) electronically or physically accessible to the department upon the department's request; and

(2) maintained in a manner that provides an audit trail between the group's general ledger and the group's source documents.

(d) A group's electronic books and records must be maintained with reasonable controls to ensure the integrity, accuracy, and reliability of the electronic storage system and to prevent the deterioration of the electronic books and records.

(e) A group must ensure a weekly backup of its electronic books and records.

(f) A group must be able to access a complete and current set of its electronic books and records or a complete and current backup of its electronic books and records from a location in the State of Texas at all times.

(g) This section does not in any way limit the commissioner's authority under the Labor Code §407A.252 and §407A.355.

(h) To the extent of a conflict between this section and the Labor Code §§407A.252 or 407A.355, the Labor Code §407A.252 or §407A.355 prevails.

(i) A group holding a certificate of approval issued prior to the effective date of this section shall comply with the provisions of this section no later than 30 days after the effective date of this section.

§5.6411. Contract Provisions.

(a) A group shall execute a written agreement with a person identified pursuant to §5.6403(c)(12)(A) or (B) of this division (relating to Application for Initial Certificate of Approval) that meets the requirements of this section [~~that engages any person to perform any function regulated under the Texas Insurance Code or Labor Code shall execute a contract with that person~~].

(b) If a person identified pursuant to §5.6403(c)(12)(A) or (B) of this division delegates any of its management or discretionary decision making authority relating to a function the group retains ultimate responsibility for under the Labor Code, the Insurance Code, or regulations adopted thereunder to another administrator, service company, or third party administrator, that person shall execute a written agreement with that administrator, service company, or third party administrator that meets the requirements of this section.

(c) [~~(b)~~] A group retains ultimate accountability and responsibility for compliance with all statutory and regulatory requirements, and no written agreement [~~contract, including a contract with the ad-~~

~~ministrator or a service company,~~] may be construed to limit, in any way, the group's ultimate accountability and responsibility.

(d) [~~(c)~~] A written agreement [~~Any contract~~] entered into [~~between a group and~~] pursuant to subsection (a) or (b) of this section shall include [~~an administrator or a service company or any other person to perform functions regulated by the department must contain~~]:

[~~(1) a provision that the contract may not be construed to limit in any way the group's responsibility, including financial responsibility, to comply with all statutory and regulatory requirements;~~]

(1) [~~(2)~~] a requirement [~~a provision~~] that the administrator, service company, or third party administrator must [~~requires subcontractors to~~] comply with the applicable requirements of the [~~Texas~~] Insurance Code and the Labor Code and rules adopted thereunder, including holding the appropriate licenses or certificates of authority under the Insurance Code or the Labor Code;

[~~(3) a provision that requires the subcontractor to be appropriately licensed to perform any function required by the Texas Insurance Code to be licensed; and~~]

(2) [~~(4)~~] a requirement that the administrator, service company, or third party administrator must permit [~~a provision that permits~~] the commissioner or the group [~~Commissioner~~] to examine at any time:

(A) its [~~the~~] financial solvency; [~~of the person,~~] and

(B) its [~~the~~] ability [~~of the person~~] to perform its responsibilities under the written agreement; [~~contract.~~]

(3) a description of the duties or services that the administrator, service company, or third party administrator is expected to provide and any applicable instructions related to the performance of those services, including references to a group's claims handling practices or procedures; and

(4) a provision relating to continuity of services, including run off fee schedules and the transfer of the books and records of a group from one administrator, service company, or third party administrator to another administrator, service company, or third party administrator.

(e) A written agreement entered into pursuant to subsection (a) or (b) of this section shall also ensure that the books and records of the group:

(1) remain the property of the group at all times;

(2) are available to the group or its designee at any time while in the custody of an administrator, service company, or third party administrator; and

(3) will be timely transferred to the group or its designee upon:

(A) request of the group; and

(B) at the termination or cancellation of a written agreement entered into pursuant to subsection (a) or (b) of this section.

(f) A written agreement required under subsection (a) or (b) of this section must meet the requirements of this section no later than June 1, 2009.

§5.6412. Operational Review Plan.

(a) A group shall annually adopt an operational review plan that provides for sufficient oversight of any person who has entered into a written agreement pursuant to §5.6411(a) or (b) of this division (realating to Contract Provisions). The group may modify the operational review plan at any time in order to meet the group's needs.

(b) The operational review plan shall, at a minimum:

(1) include the group's estimated projections for the information enumerated in paragraph (2) of this subsection for each quarter of the group's upcoming fund year;

(2) require any person that has entered into a written agreement pursuant to §5.6411(a) or (b) of this division to submit quarterly reports to the group containing the following information, as applicable:

(A) projected premium revenue for the current fund year and a comparison to premium revenue for the previous fund year;

(B) membership counts, including members lost and gained in the current fund year; and

(C) a summary of the performance of the group for each fund year in which the group has been in existence, including:

(i) number of claims reported;

(ii) incurred losses;

(iii) premium received;

(iv) loss ratio;

(v) expense ratio:

(vi) delineation of claims likely to exceed the specific retention; and

(vii) delineation of fund years likely to exceed any aggregate retention; and

(3) provide for corrective action, as determined by the board of trustees of the group, if the performance of the group does not meet its estimated projections required under this section.

(c) The board of trustees of a group shall consider the reports submitted pursuant to subsection (b) of this section. The reports, the board's consideration of the reports, and the board's recommendations for the group based upon the reports shall be noted in the minutes of the board of trustees of the group and shall be maintained in the books and records of the group.

§5.6413. Membership Cancellation or Termination.

(a) A group is required to notify the commissioner pursuant to the Labor Code §407A.201(c) only if the group experiences a reduction in membership, caused by either cancellation or termination, resulting in a cumulative reduction of 10 percent or more of its annual written premium, not later than the 10th day after the date on which the cumulative reduction in membership takes effect.

(b) The notification required by subsection (a) of this section must include:

(1) an explanation of the reason for the cancellation or termination of each member of the group; and

(2) a statement indicating how the group anticipates addressing the membership loss, including whether or not assessments of the remaining members of the group will be necessary.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 11, 2008.

TRD-200803576

Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: August 24, 2008
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 299. DAMS AND RESERVOIRS

The Texas Commission on Environmental Quality (commission or agency) proposes the repeal of §§299.1 - 299.5, 299.11 - 299.18, 299.21 - 299.31, 299.51, and 299.61; and new §§299.1 - 299.7, 299.11 - 299.17, 299.21 - 299.33, 299.41 - 299.46, 299.51, 299.52, 299.61, 299.62, 299.71, and 299.72.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The existing dam safety rules, adopted in 1986, were developed after significant changes were made to the standards used to evaluate dams by the National Dam Safety Program. Even though the agency's Dam Safety Program has undergone significant changes since then, no changes have been made to the existing rules since their adoption in 1986. The commission proposes to repeal the existing rules in Chapter 299 and proposes new, updated rules in Chapter 299.

In recent years, three distinct reviews were conducted of the Dam Safety Program rules. The reviews included: 1) the Executive Director's Task Force on Dam Safety (a task force of 26 stakeholders representing a wide cross section of interests) in 1998; 2) the House Natural Resources Subcommittee on Dam Safety in November of 1998; and 3) a peer review by the Association of State Dam Safety Officials, at the request of the agency, in 2003. The reviews made several recommendations for significant modifications and updates to the existing rules. This rulemaking incorporates many of the recommendations.

Two stakeholder meetings were held in 2005 with approximately 40 individuals representing owners, professional engineers, associations, sponsors of Natural Resources Conservation Service assisted project dams, federal agencies, and state agencies. Owners included members of the general public. Environmental groups were also invited but did not attend. Considerable input was received and incorporated in this rulemaking. Dam safety rules from at least ten states were also reviewed in 2005.

Other meetings were held in 2005 and 2006 with the Texas Association of Watershed Sponsors, Texas Water Conservation Association, and American Society of Civil Engineers to discuss the proposed rule package.

Two additional stakeholder meetings were held in 2008 with approximately 40 individuals, including several individuals who participated in the 2005 stakeholder meetings. Considerable input was again received and incorporated in this rulemaking.

The State Auditor's Office has prepared *An Audit Report on the Dam Safety Program at the Texas Commission on Environmental Quality*, published in May 2008. It is recommended in this report that the commission should revise the rules to address key dam safety practices.

These proposed new rules make the program more similar to federal and other state programs.

The existing rules are proposed to be repealed and new rules are proposed. The proposed new rules relate to design, review, and approval of construction plans and specifications; construction, operation and maintenance, inspection, repair, removal, emergency management, site security, and enforcement of proposed and existing dams. The proposed new rules would revise existing criteria to make them more consistent with current engineering industry practices. The proposed new rules would also add requirements for emergency action plans, gate operating plans, and security plans and would better define an owner's responsibilities.

The proposed new rules would also provide options for upgrading existing dams. These proposed new rules would ease some of the inspection burden by removing small- and intermediate-size, low-hazard dams from a periodic inspection schedule.

The proposed new rules would improve the organizational flow of the requirements and would update all relevant cross-references and citations.

The commission proposes administrative changes throughout the proposed rules to be consistent with Texas Register requirements and agency guidelines. These changes include spelling out acronyms, updating references to the commission's predecessor agencies, and updating cross-references.

The commission proposes to repeal all sections of the current chapter and proposes new sections that improve organization and readability. The proposed reorganization of this chapter would remove redundancy in the requirements and place similar requirements in the same section.

SECTION BY SECTION DISCUSSION

Proposed new §299.1, Applicability, would establish the applicability of this chapter.

Existing §299.1(1), relating to the definition of dam, would be moved in part to proposed new §299.1 to clarify how this chapter applies to different types of dams and to be consistent with the definition used in federal regulations.

Proposed new §299.1(a) would limit the applicability of this chapter to certain types of dams and would ensure that the commission's rules correspond to federal regulations. Figure: 30 TAC §299.1(a)(2) would be added to make the definition clearer.

Proposed new §299.1(b) would include language indicating that all requirements for dams are included in this chapter, but would not relieve the owner from meeting the requirements for water rights and Edwards Aquifer protection plans. This is necessary to ensure that owners are aware of other requirements that may apply to their dams.

Proposed new §299.1(c) would include language from existing §299.1(1) and would add federally owned dams from existing §299.21, Applicability, and above-ground water storage tanks to the list of dams to be consistent with the practice of the Dam Safety Program.

Proposed new §299.1(d) would include language that all dams shall meet the size and hazard requirements of the chapter, including those exempt from the requirements of Subchapter C, Construction Requirements, and those that are granted an exception under §299.5, Exception. This language is necessary to make it clear that all owners of dams shall follow the require-

ments and to prevent dams from being constructed without using standards as outlined in this chapter.

Existing §299.1, Definitions, would be repealed and moved to proposed new §299.2, Definitions. The definitions for "Effective crest of the dam," "Probable maximum flood (PMF)," and "Probable maximum precipitation (PMP)," "Existing dam," "Height of dam," "Normal storage capacity," and "Proposed dam" would be moved from existing §299.1 to the proposed new §299.2, renumbered to accommodate the addition of new definitions now found in proposed new §299.2, and changed to clarify the language to avoid misinterpretation. The commission determined that there was a need for clearer definitions because a number of questions have been raised on the interpretation of these definitions.

The definition for "Dam" would be moved from existing §299.1 to new §299.2(14), renumbered to accommodate the addition of new definitions, and changed to clearly identify a dam as being a barrier, or barriers, constructed for the purpose of impounding water. The definition would be expanded to include a dam's appurtenant structures as being part of the dam and to indicate that it would be used for the purpose of either permanently or temporarily impounding water. The commission determined that this is a more inclusive definition, similar to the federal definition.

The definition for "Deliberate impoundment" would be moved from existing §299.29, Deliberate Impoundment, and would be included in the list of definitions in proposed new §299.2(17), instead of in the text of the rules to avoid confusion. The formatting and the rule language would be modified to be consistent with Texas Register requirements and agency guidelines, but there are no substantive changes.

The definition of "Deficient dam" would be included in proposed new §299.2(16) to ensure that the commission's rules correspond to the definition in the federal regulations.

The definitions for "Spillway design flood" and "Spillway evaluation flood" would be deleted and replaced by the term "Design flood" to proposed new §299.2(18) to remove redundancy and avoid confusion. "Design flood" includes both deleted terms.

The definition for "Hazard classification" would be moved from existing §299.13, Hazard Classification Criteria, to proposed new §299.2(29) and changed to clarify the language. The commission determined that the language in existing §299.13 has been confusing since numerous questions have been received concerning the definition.

The definition for "Maximum storage capacity" would be moved from existing §299.1 to proposed new §299.2(36). The definition would be expanded to reflect that, for purposes of these rules, the storage capacity does not include areas that would be below natural ground. The commission determined that the maximum storage capacity was related to the amount of water that would be released during a failure of the dam and that water impounded below natural ground would not be released during such an event.

The definition for "Owner" would be included to list the different persons that could be identified as an owner of a dam. Proposed new §299.2(44)(A) would list an owner as a person who holds legal possession or ownership of an interest in a dam. Proposed new §299.2(44)(B) would list an owner as a person who is the fee simple owner of the surface estate of the tract of land on which the dam is located. Proposed new §299.2(44)(C) would list an owner as a person who is a sponsoring local organization of a dam constructed by the Natural Resources Conservation Service. Proposed new §299.2(44)(D) would list an owner as a person who has a lease, easement, or right-of-way to construct, operate, or maintain a dam. This is necessary to list all potential owners of a dam.

The definitions for "Abandon," "Accepted engineering practices," "Alteration," "Appurtenant structures," "Breach," "Breach analysis," "Breach inundation area," "Closure of dam," "Closure section," "Commence construction," "Conceptual design," "Construction," "Construction change order," "Dam failure," "Detention dam," "Drawdown," "Emergency action plan," "Emergency repairs," "Emergency spillway," "Engineering inspection," "Enlargement," "Fetch," "Inundation map," "Loss of life," "Main highways," "Maintenance," "Maintenance inspection," "Minimum freeboard," "Minor highways," "Modification," "NAD83 conus datum," "NAVD88 datum," "Outlet," "Piping," "Principal spillway," "Professional engineer," "Reconstruction," "Rehabilitation," "Removal," "Repairs," "Reservoir," "Safe manner," "Seal," "Secondary highways," "Secure location," "Spillway," "Sponsoring local organization," "Stability analysis," and "Substantially complete" would be added to proposed new §299.2 to clearly define terms and words that are unique to the dam safety industry for clarity of their use in this chapter.

Existing §299.2, General, and existing §299.3, Duties, Obligations, and Liabilities of Dam Owners, would be repealed and the requirements contained in those sections would be either deleted or moved from the repealed sections to new sections to improve the organization and readability.

Proposed new §299.3(a) would include that the executive director may require an owner to obtain an independent team of consultants or other dam safety experts to evaluate the adequacy of the dam or appurtenant structures if the executive director has determined that the dam constitutes a significant threat to human life or property. Language would also be added to provide the requirements for use of an independent team of professional engineers or other dam experts and will be included in a guidance document developed by the executive director. The commission determined that an independent team would be better able to evaluate all aspects of the adequacy of the dam and make recommendations. This process has been used successfully at least two times for dams in Texas. These determinations may be necessary for certain dams in order to ensure their safety and compliance with these rules.

Proposed new §299.3(b) would require an owner submitting an application for a water rights permit that includes a dam to provide documentation that ensures that the owner submits the proper materials to ensure that the requirements of this rule will be met during the application review.

Existing §299.4, Registered Engineer, would be repealed and the proposed new §299.4 would be renamed "Professional Engineer" to agree with the term used by the Texas Board of Professional Engineers.

Proposed new §299.4(a)(1) would include language from existing §299.4 that would be rewritten for ease of readability. Proposed new §299.4(a)(2) would include language that professional engineers shall prepare evaluations, analyses, and reports as required in this chapter. This change was made to ensure that all duties of a professional engineer would be in one rule to avoid confusion. Proposed new §299.4(a)(3) would include language from existing §299.26, Construction Inspection, to ensure that all duties of a professional engineer would be in one rule to avoid confusion and would ensure that

the requirements do not conflict with contract requirements of the engineering industry. Proposed new §299.4(a)(4) would include, in the list of duties of a professional engineer performing or supervising the engineering, inspections of high- and significant-hazard dams and large, low-hazard dams, as defined in proposed new §299.13, Size Classification Criteria, and §299.14, Hazard Classification Criteria. The commission determined that due to the size and hazard of these dams, this requirement would be necessary to ensure that the engineering characteristics of the dam and appurtenant structures are being evaluated according to accepted engineering practices.

Proposed new §299.4(b) concerning waiver of requirements by the executive director would include language from the last phrase of existing §299.4 and would be rewritten for ease of readability.

Existing §299.5, Exception, would be repealed and moved to the proposed new §299.5, Exception. Proposed new §299.5(a) would include language from existing §299.5 that would be modified to be consistent with Texas Register requirements and agency guidelines. The term "registered engineer" would be changed to "professional engineer" to agree with the term used by the Texas Board of Professional Engineers.

Language would be added in §299.5(b) to identify the materials the owner would need to submit to the executive director with the exception request. This requirement would clarify the types of material needed to be submitted by the owner with the exception request.

Proposed new §299.5(c) would include language to specify the method for either approving or denying the exception request. This is necessary to provide owners and engineers with the commission's procedure for addressing exception requests.

Proposed new §299.6, Changing Ownership of Dams, would include a requirement to notify the executive director when there is a change in ownership of a dam. This requirement was recommended in the report prepared by the 1998 Executive Director's Task Force on Dam Safety and would be necessary for the executive director to maintain a current list of owners and contact information in the event of an emergency.

Proposed new §299.7, Inventory of Dams, would include a requirement for the executive director to maintain an inventory of dams in Texas. The commission determined that the inventory would be essential to maintaining a database for information on the dam and owner, for providing statistics on dams during the legislative process, and for continuing to receive federal funds for the Dam Safety Program. The State Auditor's Office has also recommended that this requirement is essential to the Dam Safety Program.

Existing §299.11, Classification of Dams, would be repealed and moved to proposed new §299.12, Classification of Dams, for better organization of the subchapter.

Proposed new §299.11 concerning the evaluation of the hydrologic, hydraulic, and structural adequacy of a dam would include language from existing §299.2(b) and would be modified to be consistent with Texas Register requirements and agency guidelines.

Proposed new §299.11(1) would include language that the hydrologic and hydraulic adequacy of a dam would be evaluated using the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. The commission determined that the procedures used in previous hydrologic and hydraulic studies needed to be reviewed and revised, and new research had been conducted on the hydrologic criteria, which would provide a more representative approach. This would result in less cost to owners for upgrading dams to meet the minimum hydrologic criteria. The new procedures are included in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. This requirement would be necessary to ensure that professional engineers use the most current and easily verified procedures.

Proposed §299.11(2) concerning a list of conditions that may endanger a dam would include language from existing §299.2(b) and would be modified to be consistent with Texas Register requirements and agency guidelines.

Existing §299.12, Size Classification Criteria, would be repealed and moved to proposed new §299.13, Size Classification Criteria, for better organization in the subchapter.

Proposed new §299.12(a) concerning classification of dams by size and hazard and not on the condition of the dam would include language from existing §299.11 and would be modified to be consistent with Texas Register requirements and agency guidelines.

Proposed new §299.12(b) would include language that would allow a dam's hazard classification to be changed at any time based on an inspection and downstream hazard evaluation by the executive director or the owner's professional engineer; a breach analysis performed by either the executive director or the owner's professional engineer; or a review of current aerial photography and topographic maps along with field confirmation. During a stakeholders meeting in 2005, stakeholders expressed frustration that it appeared that a hazard classification could not be changed and that owners would be required to upgrade dams at a considerable cost when it may not be necessary. The commission determined that there has been a process in place for changing a hazard classification and that process would be included in the rules.

Existing §299.13, Hazard Classification Criteria, would be repealed and moved to proposed new §299.14, Hazard Classification Criteria, for better organization in the subchapter.

Proposed new §299.13, Size Classification Criteria, would include language from existing §299.12 that would be modified to be consistent with Texas Register requirements and agency guidelines and to be consistent with proposed new §299.1(a).

Existing §299.14, Hydrologic Criteria for Dams, would be repealed and moved to proposed new §299.15, Hydrologic and Hydraulic Criteria for Dams, for better organization in the subchapter.

Proposed new §299.14, Hazard Classification Criteria, would include language from existing §299.13 that would be modified to be consistent with Texas Register requirements and agency guidelines. Language in existing §299.14(b) indicated that the minimum hydrologic criteria would be based on both existing and planned future development. Stakeholders at a stakeholders meeting in 2005 indicated that designing for a future development that may not occur would be costly and recommended that the language be changed to be based on only a development existing at the time of the classification. In addition, language would be added to proposed new §299.14 that a breach analysis could be used as part of the classification. This language is necessary to provide owners with guidelines for the classification of dams.

Language would be added to §299.14(1) - (3) to provide more detail for the loss of life (one to six lives or one or two inhabitable structures for significant-hazard dams and seven or more lives or three or more inhabitable structures for high-hazard dams in the breach inundation area downstream of the dam). This has been the practice of the Dam Safety Program since 1986 and would be added to rules.

Existing §299.15, Evaluation of Existing Dams, would be repealed and moved to proposed new §299.16, Structural Evaluation of Dams, for better organization in the subchapter.

Proposed new §299.15(a)(1) would be added to state that this subsection would apply only to proposed dams to distinguish between proposed and existing dams.

Proposed new §299.15(a)(1)(A) would reference proposed new Figure: 30 TAC §299.15(a)(1)(A) and would include language from existing §299.14(a) and existing Figure: 30 TAC §299.14(b) that would be modified for clarity and to be consistent with Texas Register requirements and agency guidelines. Language in existing Figure: 30 TAC §299.14(b) would also be modified to change the requirements for the percentage of the PMF for large-size, low-hazard dams, small-size, significant-hazard dams, large-size, significant-hazard dams, small-size, high hazard dams, and intermediate-size, high-hazard dams. This is necessary to be consistent with the language in proposed new §299.15(a)(3). Language would be added to proposed new Figure: 30 TAC §299.15(a)(1)(A) for interpolation of the information in the table. The upper limits for the interpolation for large dams are based on analysis of the heights of large dams in Texas (only one dam exceeds the 200-foot height) and the maximum storage capacity (300,000 acre-feet maximum storage capacity is in the middle of the maximum storage capacities for the large dams in Texas). The commission determined that dams with maximum storage capacities greater than 300,000 acre-feet should be at the upper range of the minimum hydrologic criteria. Stakeholders during the last stakeholder meeting in 2008 recommended a change in the table to provide more consistency.

Proposed new §299.15(a)(1)(B) would include language indicating that the minimum design flood hydrograph shall be based on size and hazard classification of a proposed dam at the time of the design and shall be calculated using the criteria in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. The commission determined that the procedures used in previous hydrologic and hydraulic studies needed to be reviewed and revised, and new research had been conducted on the hydrologic criteria, which would provide a more representative approach. This would result in less cost to owners for upgrading dams to meet the minimum hydrologic criteria. The new procedures are included in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. This requirement would be necessary to ensure that professional engineers use the most current and easily verified procedures.

Proposed new §299.15(a)(1)(C) would allow proposed dams and spillways or dams and spillway to be reconstructed, modified, enlarged, rehabilitated, or altered using hydrologic procedures of the Natural Resources Conservation Service to be acceptable, provided the procedures are shown to be equal to or more conservative than the procedures in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. This is necessary to continue a policy that has been in place since 1986.

Proposed new §299.15(a)(2) would include language that any dam designed to withstand overtopping without failure of the dam, including the foundation and abutments, would be exempt from meeting the minimum hydrologic criteria. A dam that would be designed to withstand overtopping would be armored with a material to allow overtopping without failing under any flood event. A dam with this design would be exempt.

Proposed new §299.15(a)(3)(A) would include language that an existing dam, that was required to pass 100% of the PMF before the effective date of these rules and is shown to pass 75% or more of the PMF by a professional engineer, would not be required to be upgraded to minimum hydrologic criteria. The dam would be considered adequate to meet the minimum hydrologic criteria provided the owner has the following: 1) an emergency action plan that meets the requirements in proposed new §299.61, Emergency Action Plans; 2) an operation and maintenance program; 3) an inspection program; and 4) provides an annual report to the executive director, beginning 12 months after the effective date of this rule. The 1998 Executive Director's Task Force on Dam Safety and the stakeholders in the 2005 stakeholder meetings strongly recommended that existing dams be addressed differently than proposed dams. The commission agreed and determined that many of the dams that do not meet the minimum hydrologic criteria, were constructed, and possibly approved, under a previous set of rules and regulations and that a criteria of 75% of the PMF would be appropriate for the average of the extreme storms in the state. The commission also determined that the owners of these dams needed to meet additional requirements to maintain the dam in a safe manner. Nearly 40% of the high hazard dams in Texas would be considered adequate under this proposal compared to nearly 30% under the current rules.

Proposed new §299.15(a)(3)(B) would include language that a dam that was required to meet the minimum hydrologic criteria before the effective date of these rules, but is shown by a professional engineer to meet the minimum hydrologic criteria in Figure: 30 TAC §299.15(a)(1)(A), will not be required to be upgraded and the dam would be considered adequate to meet the new minimum hydrologic criteria. This is necessary to provide consistency with subsection (a)(3)(A).

Proposed new §299.15(a)(3)(C) includes language from existing §299.15(a) that would be modified to be consistent with Texas Register requirements and agency guidelines. In addition, language would be added that if an existing dam does not meet the minimum hydrologic criteria or if the hazard classification of an existing dam has been raised and the dam does not meet the minimum hydrologic criteria, the executive director may require the owner to submit to the executive director one of the following prepared by a professional engineer: 1) construction plans and specifications for upgrading the dam; 2) an analysis or other option to request a reduction in the minimum hydrologic criteria; or 3) a plan for an alternative to upgrading. The stakeholders in 2005 recommended that options be made available for dam owners. The commission agreed that options need to be available for owners to find the best solution for providing a safe dam.

Proposed new §299.15(a)(3)(D) would provide language that when a dam that meets the requirements of subsection (a)(3)(A) is required to be modified due to structural deficiencies, the executive director shall require the owner to submit final construction plans and specifications for the structural modifications without having to upgrade the dam to meet the minimum hydro-

logic criteria. This is necessary to provide owners with guidance for upgrading dams and to avoid unnecessary modifications.

Proposed new §299.15(a)(4)(A)(i) would include language that one of the options to reduce the minimum hydrologic criteria would be for a breach analysis to be prepared by a professional engineer. The breach analysis would model three different scenarios and would need to demonstrate that existing downstream improvements would not be adversely affected (defined as the downstream flooding differentials being less than or equal to one foot between breach and non-breach simulations in the affected area). The commission determined that a breach analysis is a viable option for owners to use in reducing the minimum hydrologic criteria since a differential of one foot or less would not cause additional flooding or loss of life.

Proposed new §299.15(a)(4)(A)(ii) would include language from existing §299.14(b) and existing §299.15(b) and would be modified to be consistent with Texas Register requirements and agency guidelines. Language would be added that other technical options would be included in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. The commission determined that the procedures used in previous hydrologic and hydraulic studies needed to be reviewed and revised, and new research had been conducted on the hydrologic criteria, which would provide a more representative approach. This would result in less cost to owners for upgrading dams to meet the minimum hydrologic criteria. The new procedures are included in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. This requirement would be necessary to ensure that professional engineers use the most current and easily verified procedures.

Proposed new §299.15(a)(4)(A)(iii) would include language that one of the options to reduce the minimum hydrologic criteria would be for the owner to provide documentation of the purchase of, or an easement for, the property downstream of the dam that would be impacted by a dam failure showing that it had been dedicated the land for non-residential and non-commercial use. The commission determined that options need to be available for owners to find the best solutions for providing a safe dam and that this option would be an acceptable non-structural option.

Proposed new §299.15(a)(4)(A)(iv) would include language that one of the options to reduce the minimum hydrologic criteria would be for the owner to provide documentation that the property downstream of the dam that would be impacted by a dam failure had been dedicated for non-residential and non-commercial use. The commission determined that options need to be available for owners to find the best solutions for providing a safe dam and that this option would also be an acceptable non-structural option.

Proposed new §299.15(a)(4)(B) would provide a process for the executive director to review and approve the owner's request for reduction of the minimum hydrologic criteria.

Proposed new §299.15(a)(4)(C) would provide a process for the executive director to deny the owner's request for reduction of the minimum hydrologic criteria.

Proposed new §299.15(b)(1) would include language that the hydraulic adequacy for proposed dams or dams proposed to be reconstructed, modified, enlarged, rehabilitated, or repaired would be evaluated using the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. The commission determined that the procedures used in previous hydrologic and hydraulic studies needed to be reviewed and revised, and new research had been conducted on the hydrologic criteria, which would provide a more representative approach. This would result in less cost to owners for upgrading dams to meet the minimum hydrologic criteria. The new procedures are included in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. This requirement would be necessary to ensure that professional engineers use the most current and easily verified procedures.

Proposed new §299.15(b)(2) would include language that an owner shall have a professional engineer address the stability of the spillways to determine if the spillways will adequately meet the minimum hydrologic criteria without being significantly damaged. The commission determined that spillway stability was not being addressed by professional engineers during evaluations of dams and spillways. Failure to ensure stability of spillways has led to spillways being severely damaged during storm events.

Proposed new §299.15(b)(3) would include language that an owner's professional engineer determine minimum freeboard for proposed large dams as outlined in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. The commission determined that experience with dams during Hurricane Rita in 2005 indicated that freeboard could be essential during extreme storm events to prevent failure of a dam.

Proposed new §299.15(c) would include language that if it would become necessary for an owner of an existing dam to reevaluate the hydraulic adequacy, the owner shall have a professional engineer evaluate the hydraulic adequacy using the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. The commission determined that the procedures used in previous hydrologic and hydraulic studies needed to be reviewed and revised, and new research had been conducted on the hydrologic criteria, which would provide a more representative approach. This would result in less cost to owners for upgrading dams to meet the minimum hydrologic criteria. The new procedures are included in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. This requirement would be necessary to ensure that professional engineers use the most current and easily verified procedures.

Existing §299.16, Interim Alternatives, would be repealed and moved to proposed new §299.17, Alternatives to Upgrading Dams, for better organization in the subchapter.

Proposed new §299.16(a) concerning a requirement to submit a geotechnical, geological, and structural report to support the design of a proposed dam or a dam that is proposed to be reconstructed or structurally modified, enlarged, rehabilitated, or altered would include language from existing §299.23(c) Content of Construction Plans and Specifications, that would be modified to be consistent with Texas Register requirements and agency guidelines.

Proposed new §299.16(b) would include language requiring that an owner have a professional engineer develop a stability analysis as described in the most current version, at the time of the analysis, of the agency's *Design and Construction Guidelines for Dams in Texas* for proposed large- and intermediate-size dams and large and intermediate dams that are proposed to be reconstructed or structurally modified, enlarged, rehabilitated,

or altered and submit the analysis with the construction plans and specifications. Stability analyses are necessary to evaluate slopes on larger dams to ensure that slopes are flat enough to prevent slope failures such as slides. The commission determined that there were problems in the past due to the lack of minimum stability criteria on a critical dam and determined that a guideline document would be the most appropriate place to include that criteria.

Proposed new §299.16(c) would include language that would allow the executive director to request that an owner of a possible deficient dam to perform geotechnical, structural, or stability analyses to determine if the integrity of the dam was threatened. The commission determined that this language would be necessary to determine safety needs and possibly prevent a failure of a dam.

Proposed new §299.16(d)(1) would include language that would allow the executive director to request an owner to have a person, that proposes to dredge a reservoir within 200 feet of a dam, have a professional engineer perform an evaluation to determine if the integrity of the dam would be compromised by the activity. Dredging too close to a dam could result in soil seams being exposed to reservoir water that would allow water to flow under the dam or upstream slopes being disturbed. These situations could result in a failure of the dam. The 200 feet should be sufficient distance to protect the dam.

Proposed new §299.16(d)(2) would include language that would allow the executive director to request that an owner has a person that proposes to install a utility line or pipeline in a dam that requires significant excavation in the dam or spillways and that a professional engineer perform an evaluation to determine if the integrity of the dam would be compromised by the activity. These proposals need to be evaluated since utility lines and pipelines can be under pressure, and utility lines and pipelines need to be installed with a specified amount of cover, which could mean a significant depth into the dam. Utility lines and pipelines can affect the stability of the dam, and these lines could break under pressure and cause the dam to fail.

Proposed new §299.16(d)(3) would include language that would allow the executive director to request that an owner has a person that proposes to construct a road across a dam or spillways or within 200 feet of the dam and that a professional engineer perform an evaluation to determine if the integrity of the dam would be compromised by the activity. These proposals need to be evaluated since traffic on the road can exceed the design loads for the dam and could cause depressions in the dam which could result in settlement of the dam or slides from water standing in the depression. A road, if not properly designed and constructed, could affect the stability of the dam. The 200 feet should be sufficient distance to protect the dam.

Proposed new §299.16(d)(4) would include language that would allow the executive director to request that an owner has a person that proposes to drill oil or gas wells or perform oil or gas exploration within 200 feet of a dam and that a professional engineer perform an evaluation to determine if the integrity of the dam would be compromised by the activity. Removal of oil and gas from a well or exploration for oil and gas could result in settlement of the foundation beneath a dam resulting in a failure of the dam. Equipment used by the drilling company could also cause damage to the dam resulting in cracking, slope failures, or possible failure of the dam. The 200 feet should be sufficient distance to protect the dam.

Proposed new §299.16(d)(5) would include language that would allow the executive director to request that an owner has a person that proposes to blast within 1/2 mile from a dam and that a professional engineer perform an evaluation to determine if the integrity of the dam would be compromised by the activity. Blasting can result in waves similar to earthquake waves. Under certain situations, blasting could result in cracks in the foundation or liquefaction of the foundation or embankment soils and failure could occur. The 1/2 mile should be sufficient distance to protect the dam.

Existing §299.17, Emergency Management, would be repealed and moved to proposed new §299.61 for better organization within the chapter.

Proposed new §299.17(a) would include language for alternatives to structural upgrading of a dam. The 1998 Executive Director's Task Force on Dam Safety and the stakeholders participating in the 2005 stakeholder meetings strongly recommended that there be alternatives to upgrading a dam. Structural upgrading is costly. The commission determined that many of the dams that do not meet the minimum hydrologic criteria were constructed, and possibly approved, under a previous set of rules and regulations and that a criteria of 75% of the PMF would be appropriate for the average of the extreme storms in the state. The commission also determined that the owner of the dams covered by the subsection needed to meet additional requirements to maintain the dam in a safe manner. The commission determined that alternatives could also include reduction of minimum hydrologic criteria according to §299.15(a)(4), removal of the dam, lowering the reservoir to a level that would allow it to meet the appropriate minimum hydrologic criteria, or a combination of structural or non-structural methods as proposed by the owner's professional engineer.

Proposed new §299.17(b) would provide a process for the executive director to review the owner's alternative plan for the dam.

Existing §299.18, Variance, would be repealed.

Existing §299.21, Applicability, would be repealed and moved to proposed new §299.21, Applicability.

Proposed new §299.21(a) concerning dams covered by the rules would include language from existing §299.21 that would be modified to be consistent with Texas Register requirements and agency guidelines. Existing §299.21 indicates that the subchapter would apply to dams requiring commission authorization. This language was not clear. The intent was that the subchapter would apply to dams requiring a water rights permit authorization as provided in Texas Water Code, §11.126(c). The proposed language would make that clarification and would also include any dam that is required to obtain approval of an Edwards Aquifer protection plan. The list of dams that would be subject to this subchapter would be expanded to ensure that the critical dams would have plans and specifications reviewed and construction monitored to prevent deficient dams from being built. The proposed new list would include dams originally designed and constructed with the assistance and written concurrence of the Natural Resources Conservation Service but that are being proposed to be reconstructed, modified, enlarged, rehabilitated, altered, or repaired without the assistance and written concurrence of the Natural Resources Conservation Service. This situation has already occurred for 22 dams. The list of dams covered in these rules was discussed with the Natural Resources Conservation Service office in Temple before being added to the rule. The list would also include

dams used for temporary detention purposes and impounding a maximum storage capacity of over 200 acre-feet. These dams would potentially be located in areas where failure could cause loss of life and the dams have not been reviewed under the language in existing §299.21, and also include small, high- and significant-hazard dams exempted from a water rights permit under Texas Water Code, §11.142. The commission determined that these dams all need to be subject to this subchapter to prevent deficient dams from being constructed.

Proposed new §299.21(b) concerning dams excluded from these rules would include language from existing §299.21 and proposed new §299.22, Review and Approval of Construction Plans and Specifications, that would be modified to be consistent with Texas Register requirements and agency guidelines. The proposed subsection would clearly identify which dams were originally designed and constructed with the assistance and written concurrence of the Natural Resources Conservation Service and would not be subject to the subchapter. This was a concern expressed in one of the stakeholders meetings in 2005. Also, dams constructed for mining purposes and approved and inspected by the Mine Safety and Health Administration would be excluded to avoid duplication of the approval process. This was also a concern expressed in one of the stakeholder meetings in 2005. Another exclusion is small, low-hazard dams exempted from a water rights permit. These dams are generally built on farms and ranches for livestock use and are not located where a failure would result in loss of life. The subsection would also exempt maintenance and emergency repairs from being subject to the subchapter, which is in agreement with Texas Water Code, §11.144.

Existing §299.22, Approval of Plans and Specifications, would be repealed and moved to proposed new §299.22.

Existing §299.23, Content of Construction Plans and Specifications, would be repealed and moved to proposed new §299.22 and proposed new §299.16 for better organization within the subchapter.

Proposed new §299.22(a)(1) would include language from existing §299.22 that would be modified to be consistent with Texas Register requirements and agency guidelines. The requirement for sealing, signing, and dating the construction plans and specifications would ensure that the commission's rules correspond to the requirements of the Texas Board of Professional Engineers. The rule ensures that the requirements do not cover emergency repairs.

Proposed new §299.22(a)(2) would ensure that the commission's rules would be in addition to the requirements in Texas Water Code, §11.121 and 30 TAC Chapter 213, relating to Edwards Aquifer.

Proposed new §299.22(a)(3) would require that the plans and specifications for proposed dams would not be approved by the executive director unless the plans and specifications include language, or design criteria, that require the proposed contractor to develop a Storm Water Pollution Prevention Plan and submit a Notice of Intent for coverage under the State of Texas Construction General Permit. This is necessary to ensure that the commission's rules are consistent with federal requirements and language in 30 TAC §281.25(a)(4).

Proposed new §299.22(a)(4) would include language from existing §299.22 that would be modified to be consistent with Texas Register requirements and agency guidelines. The language would also ensure that the commission's rules would correspond to Texas Water Code, §11.126(c), and Texas Water Code, §11.144.

Proposed new §299.22(a)(5) would clarify that the construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam shall be performed according to approved construction plans and specifications unless construction change orders have been approved as indicated in proposed new §299.26, Construction Change Orders. This subsection is necessary to ensure that dams are built according to approved plans.

Proposed new §299.22(b)(1) would include language for options on the size of construction plans and a requirement for a scale. The standard size of construction plans is 22 inches by 34 inches. The option of submitting half-size plans would be allowed if the details are legible. This option would provide a small cost savings for owners. The language on scale would correspond with Texas Water Code, §11.126(b).

Proposed new §299.22(b)(1)(A) would include language requiring a vicinity map on the construction plans. Currently, most construction plans include a vicinity map. The commission determined that a map identifying all features would be essential to determine impact of the features on the dam and the dam's impact on the features. Each of the features on the vicinity map could have a significant impact on the design of the dam.

Proposed new §299.22(b)(1)(B) would include language from existing §299.23(a)(1) that would be modified to be consistent with Texas Register requirements and agency guidelines. New language would require latitude and longitude for the midpoint of the dam for ease in locating the dam in the field.

Proposed new §299.22(b)(1)(C) would include language from existing §299.23(a)(2) that would be modified to be consistent with Texas Register requirements and agency guidelines. New language would include the proposed bottom of the core trench and elevations of all features. The commission determined that the core trench is essential for a dam and that the core trench be excavated into impervious material (material that is difficult for water to flow through). The elevations are critical to ensure that any potential flow is being addressed to avoid potential for failure of the dam or appurtenant structures in the future.

Proposed new §299.22(b)(1)(D) concerning inclusion of a spillway profile on the construction plans would be moved from existing §299.23(a)(2) without change.

Proposed new §299.22(b)(1)(E) would include language from existing §299.23(a)(2) that would be modified to be consistent with Texas Register requirements and agency guidelines. New language would provide that the boring logs would only be included on the construction plans if they are not included in a separate geotechnical report, which is preferred. This is necessary so that engineers are not required to place the logs of borings on the construction plans, thereby creating insurance issues for the engineers.

Proposed new §299.22(b)(1)(F) concerning inclusion of a cross section of the dam on construction plans would be moved from existing §299.23(a)(3) without change.

Proposed new §299.22(b)(1)(G) concerning inclusion of detailed sections of outlet conduits, control works, and spillways on the construction plans would include language from existing §299.23(a)(4) that would be modified to be consistent with Texas Register requirements and agency guidelines.

Proposed new §299.22(b)(1)(H) concerning inclusion of different types of instrumentation on the construction plans would include language from existing §299.23(a)(5) that would be modified to be consistent with Texas Register requirements and agency guidelines.

Proposed new §299.22(b)(1)(I) concerning inclusion of requirements, or design criteria, for a contractor to develop a Storm Water Pollution Plan on construction plans would be modified to be consistent with federal requirements and language in §281.25(a)(4).

Proposed new §299.22(b)(1)(J) would include language that would require including other design standards as described in the most current version, at the time of the evaluation, of the agency's *Design and Construction Guidelines for Dams in Texas*. The commission determined that a guideline document would be the appropriate place to include other design standards instead of the rules.

Proposed new §299.22(b)(2) would include language for options on the size of construction plans and for a requirement for a scale. The standard size of construction plans is 22 inches by 34 inches. The option of submitting half-size plans would be allowed if the details are legible. This option would provide a small cost savings for owners. The language on scale would correspond with Texas Water Code, §11.126(b).

Proposed new §299.22(b)(2)(A) would require a vicinity map on the construction plans. Currently, most construction plans include a vicinity map. The commission determined that a map identifying all features would be essential to determine impact of the features on the dam and the dam's impact on the features. Each of the features in the language could have a significant impact on the design of the dam.

Proposed new §299.22(b)(2)(B) would include language from existing §299.23(a)(4) that would be modified to be consistent with Texas Register requirements and agency guidelines.

Proposed new §299.22(b)(2)(C) would include language from existing §299.23(a)(2) that would be modified to be consistent with Texas Register requirements and agency guidelines. Language would be added that the boring logs would only be included on the construction plans if they are not included in a separate geotechnical report, which is preferred. This is necessary so that engineers are not required to place the logs of borings on the construction plans, thereby creating insurance issues for the engineers.

Proposed new §299.22(b)(2)(D) concerning inclusion of requirements, or design criteria, for a contractor to develop a Storm Water Pollution Plan on the construction plans would be modified to be consistent with federal requirements and language in §281.25(a)(4).

Proposed new §299.22(b)(2)(E) would include language that would require including other design criteria as described in the most current version, at the time of the design, of the agency's *Design and Construction Guidelines for Dams in Texas*. The commission determined that a guideline would be the appropriate place to include other design criteria instead of the rules.

Proposed new §299.22(c)(1) concerning the requirement for the various types of materials to be included in the specifications would include language from existing §299.23(b)(1) that would be modified to be consistent with Texas Register requirements and agency guidelines.

Proposed new §299.22(c)(2) would include language from existing §299.23(b)(3) that would be modified to be consistent with Texas Register requirements and agency guidelines. Language would be added that construction plans would not be substantially changed without either written approval by the executive director or notification of the changes as defined in proposed new §299.26. This is necessary to provide alternatives for construction change order processing and approval to avoid delays in construction and causing increased costs.

Proposed new §299.22(c)(3) concerning a requirement to be included in the specifications for the proposed contractor to develop a Storm Water Pollution Plan would be modified to be consistent with federal requirements and language in §281.25(a)(4).

Proposed new §299.22(c)(4) would include language that would require including other design specifications as described in the most current version, at the time of the design, of the agency's *Design and Construction Guidelines for Dams in Texas*. The commission determined that a guideline document would be the appropriate place to include other design specifications instead of the rules.

Proposed new §299.22(d)(1)(A) would list geotechnical, geological, and structural evaluation reports for all proposed dams and dams that are proposed to be reconstructed, modified, enlarged, rehabilitated, altered, or repaired that may be required for review during the executive director's review of plans and specifications. In the current review method, professional engineers are requested to submit geotechnical, geological, and structural reports. The commission determined that these reports are necessary to properly evaluate the safety of the proposed dam.

Proposed new §299.22(d)(1)(B) concerning a stability analysis that may be required by the executive director would include language from existing §299.23(c) that would be modified to be consistent with Texas Register requirements and agency guidelines.

Proposed new §299.22(d)(1)(C) would include language from existing §299.2(b) and would be modified to be consistent with Texas Register requirements and agency guidelines for all proposed dams and dams that are proposed to be reconstructed, modified, enlarged, rehabilitated, altered, or repaired. The commission determined that the procedures used in previous hydrologic and hydraulic studies needed to be reviewed and revised, and new research had been conducted on the hydrologic criteria, which would provide a more representative approach. This would result in less cost to owners for upgrading dams to meet the minimum hydrologic criteria. The new procedures are included in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. This requirement is necessary to ensure that professional engineers use the most current and easily verified procedures.

Proposed new §299.22(d)(1)(D) would require a report on the proposed instrumentation for proposed large dams and existing large dams proposed to be reconstructed, modified, enlarged, rehabilitated, altered, or repaired. Instrumentation for large dams is recommended to measure movement, settlement, pressure, and seepage flow. For large dams, this instrumentation could be critical for monitoring to prevent problems that could threaten the integrity of the dam. During construction, the instrumentation would be used to monitor increases in pressure, movement, and seepage flow. Language would be included for the frequency of data collection to be included in

the report because critical information could be missed if the data collection is too infrequent.

Proposed new §299.22(d)(1)(E) would include requirements for reports addressing site-specific conditions. Dam sites with good geotechnical and geological conditions have already been used for dams in the past. New dam sites are becoming more difficult to locate for proposed dams as evidenced by problems experienced recently by owners' professional engineers who did not prepare site-specific reports.

Proposed new §299.22(d)(2)(A) would require a quality control and assurance plan for all proposed dams. The commission determined that many of the problems associated with dams were the result of improper construction that could have been prevented with a good quality control and assurance plan. The executive director has examples of dams constructed with limited or no quality control that have, or are currently, experienced major problems.

Proposed new §299.22(d)(2)(B) would require a closure plan for any proposed dams that requires a closure section. Closure of the dam is one of the most critical parts of the construction of a dam. It is essential that this closure section be placed properly, in the right sequence, and within a reasonable amount of time to prevent a failure of the project. The commission determined that review of this plan would be necessary to prevent problems in the future.

Proposed new §299.22(d)(2)(C) would require submittal of a plan, for review, for addressing emergencies that threaten the integrity of the dam for all proposed high- and significant-hazard dams during construction. History has shown that failures do occur during construction. A properly prepared emergency plan can help the owner protect his investment and protect downstream lives and property. Review of this plan would be necessary to ensure that there is an appropriate method for addressing emergencies.

Proposed new §299.22(e)(1) would clarify a review process, which will be included in the most current version, at the time of the review, of the agency's *Design and Construction Guidelines for Dams in Texas*. The commission determined that this issue is of concern to professional engineers who are trying to get projects approved so that construction can start and that a guideline document would best address the issue.

Proposed new §299.22(e)(2) would provide a process for the executive director to notify the owner of the approval of construction plans and specifications.

Proposed new §299.22(e)(2)(A) would explain the approval method of a dam associated with a water rights permit. The subsection would require that the water rights permit be issued and a time limitation section be added to the water rights permit requiring construction of a proposed dam or reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam to be started and completed within a specified time frame before approval of the plans and specifications is given. This language would ensure that the commission's rules would be consistent with Texas Water Code, §11.121. These requirements are also necessary to ensure that dams are not built before the water rights permit is either issued or denied. If the permit is denied and the dam was built, it would require action to have the dam removed, which would be costly to the owner.

Proposed new §299.22(e)(2)(B) would explain for the approval method of a dam submitted as part of an application for an Edwards Aquifer protection plan. The language executive director would not approve the plans and specifications for the dam until an Edwards Aquifer protection plan has been issued by the appropriate regional office. This language is necessary to ensure that dams are not built without the approval of an Edwards Aquifer protection plan.

Proposed new §299.22(e)(3) - (6) would provide a process for the executive director to approve or require revisions to construction plans and specifications.

Proposed new §299.22(f)(1) would require the executive director to reevaluate the approved construction plans and specifications of a dam if construction did not commence within four years after approval. The purpose for the reevaluation would be to determine if the approval may be invalid due to any changes of the rules, regulations, and accepted engineering practices, or downstream hazard classification, during the four-year period. This determination would be made regardless of any extension of time authorization is given. The commission determined that new research or legislation could result in changes in the rules or the *Hydrologic and Hydraulic Guidelines for Dams in Texas* and the plans and specifications would no longer be valid. This requirement would be necessary to ensure that the dam is built under the most current rules.

Proposed new §299.22(f)(2) would provide a process for the executive director to notify the owner that the construction plans and specifications for a dam that construction had not commenced within four years of the approval would have to be resubmitted.

Proposed new §299.22(f)(3) would require the plans and specifications to meet the rules and regulations in effect at the time they are prepared.

Existing §299.24, Maintenance of Records, would be repealed and moved to proposed new §299.23, Maintenance of Construction Records, for better organization within the subchapter.

Proposed new §299.23(a) would include language from existing §299.24(a) that would be modified to be consistent with Texas Register requirements and agency guidelines. The requirement for maintaining construction records would not only apply to construction of a proposed dam, but also to reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam. This requirement would formalize a practice that has been in place since 1986. Language on the type of construction records would be added for clarity.

Proposed new §299.23(b) would include language from existing §299.24(a) that would be modified to be consistent with Texas Register requirements and agency guidelines. This requirement would be for high- and significant-hazard dams to ensure that owners are alerted in advance of the requirements.

Proposed new §299.23(c) concerning the type of information to include in construction records would include language from existing §299.24(b) that would be modified to be consistent with Texas Register requirements and agency guidelines.

Proposed new §299.23(d) would include a requirement that the construction records be maintained by the owner in a secure location at the construction site or at a location designated by the owner that is immediately accessible to the owner until the completion of construction. This requirement is necessary to prevent unauthorized access to the records.

Proposed new §299.23(e) would include a requirement that after construction the owner would transfer the construction records to a permanent, secure location at a location designated by the owner that is immediately accessible to the owner. This requirement is necessary to prevent unauthorized access to the records and to allow the executive director to review all records upon request.

Existing §299.25, Construction Progress Reports, would be repealed and moved to proposed new §299.24, Construction Progress Reports, for better organization within the subchapter.

Proposed new §299.24, Construction Progress Reports, would include language from existing §299.25 that would be modified to be consistent with Texas Register requirements and agency guidelines. A requirement would be added to include the contractor's name and the name and telephone number of the professional engineer or inspector that will be on site during construction in the material submitted to the executive director. This requirement would be necessary for contacting personnel at the construction site for inspections or information during construction.

Existing §299.26, Construction Inspection, would be repealed and moved to proposed new §299.25, Construction Inspection, for better organization within the subchapter.

Proposed new §299.25(a) - (c) would include language from existing §299.26 that would be modified to be consistent with Texas Register requirements and agency guidelines and to correspond with Texas Water Code, §12.016. Language would be added to include a process for notifying the owner of deficiencies or violations and for the owner to bring the construction into compliance with the approved plans and specifications as outlined in the most current version, at the time of the design, of the agency's *Design and Construction Guidelines for Dams in Texas*. These requirements would be necessary to keep construction costs down due to a delay.

Existing §299.27, Plan and/or Specification Changes and Amendments, would be repealed and moved to proposed new §299.26 for better organization within the subchapter.

Proposed new §299.26(a), (b), (d), and (e) would include language from existing §299.27 that would be modified to be consistent with Texas Register requirements and agency guidelines. The term "before work commences under the changes" would be removed so that critical work would not be delayed while waiting for approval. The terms "changes" and "amendments" would be changed to "construction change order" to ensure that the commission's rules would correspond with terms used in construction to avoid confusion of terms. Language included in subsection (b) would require the owner to submit a construction change order for approval before the proposed changes start unless an emergency has occurred. In that case, a construction change order would be submitted after the work is performed. This is necessary to avoid costly delays in construction. Language would also be included to notify the executive director by telephone or electronic mail of emergency action taken within 24 hours after becoming aware of the emergency. This requirement would be necessary to allow the executive director to be aware of the emergency. Additional language would require that if the time needed for an approval of a change order will require that the construction be halted, the work may be performed once the construction change order is signed, sealed, and dated by the owner's professional engineer. Language would also require that if the construction change order is not approved, the owner would be responsible for having the work modified to reflect the approved construction change order. This is necessary to avoid costly delays in construction.

Proposed new §299.26(c) would include language on the process and time frame the executive director would use to review the construction change order according to the most current version, at the time of the review, of the agency's *Design and Construction Guidelines for Dams in Texas*. These requirements would be necessary for construction to continue in a timely manner and provide the method necessary to get a construction change order approved so construction would not be delayed.

Existing §299.28, Noncompliance with Approved Plans and Specifications, would be repealed and moved in part to proposed new §299.25 and proposed new §299.71, Enforcement, for better organization within the chapter.

Proposed new §299.27(a) would require submittal of a written request to close the dam, prepared by a professional engineer, to the executive director to close the dam before beginning closure as described in the most current version, at the time of the closure, of the agency's *Design and Construction Guidelines for Dams in Texas*. The request would also include submittal of an emergency action plan and documentation that all parts of the proposed plan for closure of the dam had been met, as described in §299.22(d)(2)(B). The commission determined that closure of a dam is a critical part of construction, and it would be necessary that all essential phases of construction be completed before closure of the dam would start. This requirement of a submission requesting approval from the executive director would require the professional engineer to verify that these essential phases are complete before a request for closure of the dam would be made and the dam could be safely closed. The commission also determined that emergencies could possibly occur during this phase of construction. The requirement for an emergency action plan would be necessary to ensure that the owner has a plan for warning the public downstream and taking appropriate action if an emergency occurs.

Proposed new §299.27(b) would include language that the owner may begin closure of the dam after receiving written approval by the executive director. The commission made this change based on comments expressed by professional engineers on the process for approval.

Proposed new §299.27(c) would include language requiring the owner to notify the executive director that the gate operation plan had been completed with the request for closure of the dam. This is necessary to ensure that a plan for operation of the gates is in place in the event the gates would need to be operated during closure of the dam to protect the dam.

Existing §299.29, Deliberate Impoundment, would be repealed and moved to proposed new §299.2(12) and proposed new §299.28, Deliberate Impoundment, for better organization within the subchapter.

Proposed new §299.28, Deliberate Impoundment, would include language from existing §299.29 that would be modified to be consistent with Texas Register requirements and agency guidelines. The requirement would clarify that the request for deliberate impoundment would be made in writing after the dam was substantially complete and that approval would be provided after the executive director verifies that construction was substantially complete according to the owner's professional engineer. The commission determined that this requirement was necessary to

clarify as to when and how a request for deliberate impoundment be made.

Existing §299.30, Certificate of Completion, would be repealed and moved to proposed new §299.29, Notification of Completion, for better organization within the subchapter.

Proposed new §299.29(a) would include language from existing §299.30 that would be modified to be consistent with Texas Register requirements and agency guidelines and to change the time frame for notification of completion. The existing time frame for submission of the notification was immediately after construction. A time frame of 45 calendar days would be more practical to allow the professional engineer additional time to ensure that the construction would be substantially complete before submitting the notification. The requirement for sealing, signing, and dating the notification would ensure that the commission's rules correspond to the requirements of the Texas Board of Professional Engineers. Additional language would be added to allow the professional engineer to submit the notification separate from the record drawings, which take longer to prepare and would put an added burden on the professional engineer.

Proposed new §299.29(b) and (c) concerning the type of information that professional engineers and owners would include in notification of project completion would include language from existing §299.30 that would be modified to be consistent with Texas Register requirements and agency guidelines.

Existing §299.31, Record Drawings and Permanent Reference Mark, would be repealed and moved to proposed new §299.30, Record Drawings, and proposed new §299.31, Permanent Reference Mark, for better organization within the subchapter.

Proposed new §299.30(a) would include language from existing §299.31 that would be modified to be consistent with Texas Register requirements and agency guidelines and to change the time frame for submission of record drawings. The existing time frame for submission of the record drawings was as soon as possible after construction. A time frame of six months would be more reasonable to allow the professional engineer additional time to ensure that all construction changes would be documented before submitting the record drawings. Additional language would be added to require the record drawings to be sealed, signed, and dated. This requirement would ensure that the commission's rules correspond to the requirements of the Texas Board of Professional Engineers.

Proposed new §299.30(b) would allow the owner to have a professional engineer submit a sealed, signed, and dated letter instead of another set of drawings if no changes were made during construction. This would reduce the cost of the project for the owner.

Proposed new §299.31, Permanent Reference Mark, would include language from existing §299.30 that would be modified to be consistent with Texas Register requirements and agency guidelines. A new requirement would be included to require latitude and longitude of the permanent reference mark(s) for ease in locating the mark(s) in the field. The commission determined that reference mark(s) are difficult to locate over time without such coordinates.

Proposed new §299.32, Gate Operation Plan, would require an owner of a proposed dam with a gated principal spillway to develop a gate operation plan before the completion of construction. The commission determined that proper operation of the gates is important for the safety of the public and that it is necessary to have the plan developed before the end of construction. A reservoir can fill to levels greater than the normal storage capacity during one rainfall event, and the owner would need to know what procedures to follow during the event to avoid putting downstream people at risk.

Proposed new §299.33(a) would require development of operation and maintenance procedures for proposed dams before completion of construction. Good operation and maintenance procedures will protect a dam against deterioration, prolong the dam's life, and should be initiated as soon as the dam is completed. Good operation and maintenance procedures will reduce the risk for the owner and for the downstream public.

Proposed new §299.33(b) would include a requirement that the owner of any proposed dam shall provide the date the owner will turn over the operation and maintenance to a property owner association, homeowner association, or any other designated group to the executive director. The executive director has received numerous complaints from property owners associations, homeowner associations, and other groups that ownership has been changed to the property owners association, homeowner association, and other group without the knowledge of the property owners association, homeowner association, or other group and the executive director has had difficulty locating the owner for correcting problems at the dam. This requirement would be necessary to have the parties identified at the end of construction so there could be a continuity of maintenance to avoid deterioration of the dam.

Proposed new §299.41, Owner's Responsibilities, would include language from existing §299.2(c) and existing §299.3 that would be modified to be consistent with Texas Register requirements and agency guidelines. As indicated in Texas Water Code, §12.052(f), the owner of a dam is responsible for the operation and maintenance of the dam. The commission determined that the operation and maintenance of a dam is extremely important to prevent deterioration and possibly failure of the dam or appurtenant structures. Aging dams are more susceptible to deterioration. Over 89% of the dams listed in the agency's inventory of dams are over 25 years old. Therefore, the requirements for addressing maintenance items as quickly as possible have become even more important.

Proposed new §299.42(a)(1) concerning the ability of the executive director to enter a person's property for the purpose of inspecting a dam to ensure that the commission's rules correspond with Texas Water Code, §12.017.

Proposed new §299.42(a)(2) would require the periodic inspections of dams by the executive director based on hazard classification on a five-year frequency for all high- and significant-hazard dams and all large, low-hazard dams. Small and intermediate, low- hazard dams would not be included in a periodic inspection schedule, but could be inspected for determining hazard classification or assessing various types of problems or conditions. The commission has determined that there are currently 1,661 high- and significant-hazard and large, low-hazard dams and that these 1,661 dams could be inspected on a five-year frequency by the current staff of seven full-time employees and through outsourcing contracts. The 1998 Executive Director's Task Force on Dam Safety also recommended a five-year frequency. The commission also determined that these dams present the greater potential for loss of life to the downstream public and should be inspected on a regular basis, instead of inspecting all of the 7,068 dams listed in the agency's inventory of dams.

Proposed new §299.42(a)(3) would describe the elements that may be included in the executive director's inspection. The inspection may include a visual inspection and evaluation of the dam, appurtenant structures, and downstream area; taking measurements; taking photographs for documentation; conducting an evaluation of the hazard classification; and reviewing and evaluating the owner's operation, maintenance, inspection programs, and the emergency action plan. The commission determined that these elements are the essential parts of an inspection for evaluating the safety, integrity, and operation of a dam and appurtenant structures.

Proposed new §299.42(a)(4) would provide that the executive director prepare an inspection report complete with recommendations, possibly including hydrologic, hydraulic, or structural evaluations, and send a copy to the owner. Owners have requested copies of reports so that they could determine the locations of problems and the recommendations for correcting the problems.

Proposed new §299.42(a)(5) would require the owner to respond to the executive director concerning an inspection, if requested, and to provide a plan of action with time frames for addressing all of the recommendations. The commission determined that the executive director has been using this method over the last year with considerable success and that there would be greater success if this was a requirement in the rules.

Proposed new §299.42(b)(1) would require the owner to inspect the dam and appurtenant structures on a regular time frame and during emergency events. The commission determined that regular inspections by the owner would be invaluable for detecting problems at an early stage and allowing the owner to make corrections before the problems become more extensive and costly to repair. Inspections after significant rainfall events and during emergency events would also help detect problems early and allow correction.

Proposed new §299.42(b)(2) would require the owner to notify the executive director by telephone or electronic mail within 24 hours and in writing within five days after becoming aware of any problems or damage that poses a threat to the dam. This requirement would be necessary to allow the executive director to document the problem or damage.

Proposed new §299.42(b)(3) would require the owner to submit all engineering reports prepared by the owner's professional engineer under this section to the executive director for review within 45 calendar days after receipt of the report. Language would be added to require the engineering inspection report to include the date of the inspection, a description of the items observed during the inspection, findings, and recommendations. This requirement would allow the executive director to review the report as soon as possible and respond to the owner so that corrections recommended by the executive director can be made with other corrections.

Proposed new §299.42(b)(4) would include language that would allow the owner to have an engineering inspection by a professional engineer on a more frequent basis than described for the executive director. The executive director may use an engineering inspection report prepared by the owner's professional engineer or a professional engineer from a federal agency in lieu of making a periodic inspection. The language on the frequency of inspections by the owner was recommended in the most recent stakeholder meeting. This language was recommended by the 1998 Executive Director's Task Force on Dam Safety to avoid duplication of effort.

Proposed new §299.43, Operation and Maintenance, would require the owner to develop an operation and maintenance program. The commission determined that a good operation and maintenance program protects a dam against deterioration and prolongs the dam's life and that a poorly maintained dam will deteriorate and could fail. Nearly all parts of the dam and appurtenant structures are susceptible to deterioration if not properly maintained. The executive director has numerous examples of poorly maintained dams. This requirement is necessary to provide owners with a tool for performing maintenance on a regular basis to provide safe dams and appurtenant structures.

Proposed new §299.43(a) would require owners to implement an operation and maintenance program. Language would be added that the owner may use the most current version, at the time of the evaluation, of the agency's *Guidelines for Operation and Maintenance of Dams in Texas*, a manual, checklist, or some other procedure to demonstrate implementation of the program. This requirement is necessary to have owners develop some type of operating and maintenance program using some type of procedure.

Proposed new §299.43(a)(1) would require schedules for engineering and maintenance inspections in the owner's program. This requirement would provide owners with an easy way of tracking inspections for documentation purposes.

Proposed new §299.43(a)(2) would require the inclusion of any restrictions imposed by the professional engineer's design in the operation and maintenance manual. This requirement is necessary because these restrictions are important for the safety of the dam and must be followed.

Proposed new §299.43(a)(3) would list the types of maintenance items to be addressed by the owner and when they should be addressed. This would allow the owner to track his maintenance for each item and have an easy way to check for maintenance items.

Proposed new §299.43(a)(4) would require inclusion of a plan for monitoring any instrumentation at the dam and appurtenant structures. This would allow the owner to track the instrumentation readings and know when a reading becomes critical.

Proposed new §299.43(b) would require the owner to document operation and maintenance activities undertaken and to provide the documentation to the executive director upon request of the executive director. The commission determined it is necessary for the owner to document the operation and maintenance activities for the record and that the review would be best performed when requested by the executive director.

Proposed new §299.44(a) would require owners of all existing intermediate- and large-size dams with a gated principal spillway to develop a gate operation plan within two years after the effective date of the rules. The commission determined that proper operation of a gated principal spillway is important for the safety of the public and that it is necessary to have an operation plan in place so the owner would know what procedures to follow during normal operating conditions or during flood events to avoid putting downstream people at risk. The two-year time frame would allow the owner time to develop the gate operation plan and to notify the executive director that the plan is either completed or that a gate operation plan already exists. Although not specifically identified in Texas Water Code, §12.052, the commission determined that gate operation plans would be part of the maintenance of dams (preserving from failure), and therefore, they are added as a requirement in the rules.

Proposed new §299.44(b) would list the gate regulating procedures and a method for coordinating releases, if applicable, that need to be included in the gate operation plan. The commission determined that these requirements are the most important parts of a gate operation plan and that the owner needs to have a plan to follow during normal operating conditions, flood events, and power failures.

Proposed new §299.44(c) would provide that the gate operation plan is an appendix to the emergency action plan. A gate operation plan would be considered an integral part of the emergency action plan since it includes the procedures to follow during an emergency operation of the gates. Language would be added to require that if the owner submits a copy of the gate operation plan, the executive director shall file it with the owner's emergency action plan in the agency's confidential, permanent records. The Office of the Attorney General determined in a letter opinion in 2005 that emergency action plans are considered confidential and are not subject to public information requests. A gate operation plan would be considered an integral part of that plan.

Proposed new §299.45(a) would require an owner to make emergency repairs under the supervision of a professional engineer and implement the emergency action plan as soon as possible after the emergency is discovered and evaluated without having to obtain approval from the executive director. The commission determined that it is essential that repairs are initiated as quickly as possible to avoid more significant damage or a failure and that the emergency action plan is implemented to alert the downstream public.

Proposed new §299.45(b) would require the owner to notify the executive director by telephone or electronic mail within 12 hours after the emergency is discovered and evaluated. This requirement would be necessary to allow the executive director to be aware of the emergency.

Proposed new §299.45(c) would require the owner to have a professional engineer develop plans for permanent repairs after the emergency repairs are completed and submit the plans for review and approval. This requirement would be necessary to be consistent with requirements of the Texas Board of Professional Engineers.

Proposed new §299.46(a) would require the owner to maintain records and reports, if available, on the inspection, operation, and maintenance of the dam. This requirement would be necessary to provide a historical record of the dam in the event problems develop and a record of all features at the dam. The commission determined that in the event of a problem, records have been invaluable in developing corrections to the problems.

Proposed new §299.46(b) would include a requirement that legible or electronic copies be maintained by the owner in a secure location designated by the owner that is accessible to the owner for the life of the dam. Proposed new §299.46(c) would include a requirement that the records, or access to the records, shall be provided to the executive director upon request. These two requirements are necessary to prevent unauthorized access to the records and to allow the executive director to determine if the dam is being inspected, operated, and maintained according to the requirements in the rules and accepted engineering practices.

Proposed new §299.46(d) would include a new requirement that an owner shall transfer all records to a new owner when there is an ownership change. This requirement is necessary to ensure that the new owner has access to all records.

Existing §299.51, Removal of Dams and Reservoirs, would be repealed and moved to proposed new §299.51, Removal or Breach of Dams, for better organization within the subchapter.

Proposed new §299.51(a) would require that the owner would be required to submit plans to the executive director for the removal or breaching of a dam. This requirement would be necessary to be consistent with other sections in the rules and to ensure that the removal or breach is properly designed.

Proposed new §299.51(b) would require that the owner have a professional engineer submit plans for the removal or breach of a dam as outlined in the most current version, at the time of the design, of the agency's *Dam Removal Guidelines*. The commission determined that removing or breaching a dam could alter the flood characteristics of the stream and could endanger downstream lives and property if not performed properly and that all items in the guidelines be addressed to provide a safe situation to downstream lives and property. The requirement for sealing, signing, and dating the removal or breach plans would ensure that the commission's rules correspond to the requirements of the Texas Board of Professional Engineers.

Proposed new §299.51(c) would provide that the owner may also be required to address environmental and social impacts for the removal or breach of a dam as described in the most current version, at the time of the design, of the agency's *Dam Removal Guidelines*, which may require approval from other agencies before construction can begin. The commission determined that removing or breaching a dam could alter the environment and increase property or human health and safety concerns downstream if not performed properly and that all items needed to be addressed to minimize the risk downstream. The commission also determined that the executive director's approval may not be the only approval necessary to perform the removal or breach of a dam.

Proposed new §299.51(d) would provide that the owner may be required to restore the property to the condition of the site before the dam was constructed. The commission determined that there are cases where a dam may exist on property not owned by the dam owner and the property owner may require the dam owner to restore the property to pre-construction conditions.

Proposed new §299.51(e) concerning the requirements for written approval of dam removal would include language for the review and approval method for removal or breaching a dam. This is necessary to provide owners with a review process.

Proposed new §299.51(f) would require that an owner shall provide the executive director within 45 days of completion of the breach or removal a notification of completion. Language would also require that an inspection be conducted to verify that the dam had been removed or breached. The commission determined that it is necessary for the owner to notify the executive director so the executive director can verify that the work had been completed according to the approved plans to avoid a partially removed or partially breached dam being left in place that could cause problems downstream if the breach enlarged or continued to cut down, releasing additional waters downstream.

Proposed new §299.52, Abandonment of Dams, would include language from existing §299.2(c) and would be modified to be consistent with Texas Register requirements and agency guidelines. Language would be included to provide that it would be

the owner's responsibility to remove or breach the dam at the owner's expense.

Existing §299.61, Emergency Action, would be repealed and moved to proposed new §299.72, Emergency Orders, for better organization within the chapter.

Proposed new §299.61(a) would require owners of all high- and significant-hazard dams to prepare an emergency action plan to follow in the event of, or threat of, a dam emergency. Emergency action plans are essential to provide owners with a plan for promptly responding during an emergency and minimizing consequences. An emergency may occur with little or no warning, thereby providing minimal time to assess and respond. These plans are designed to minimize impacts and reduce reaction time. The commission determined that the need for emergency action plans is one of the most critical requirements needed for existing dams.

Proposed new §299.61(b) would include a requirement that would give the owner two years to submit the emergency action plan after the effective date of the rules. There are 1,654 dams that are currently listed as high- and significant-hazards dams. Currently, there are only 136 high- and significant-hazard dams that have been documented by the executive director as having an emergency action plan. The owners would need time to develop the emergency action plans.

Proposed new §299.61(c) would include a requirement that a plan for addressing emergencies during construction of a proposed high- or significant-hazard dam be submitted for review before either requesting closure of the dam or upon completion of construction of the dam, if the dam does not require a closure section. History has shown that failures do occur during construction. A properly prepared emergency action plan can help the owners protect their investment and protect downstream lives and property. Review of this plan would be necessary to ensure that there is a method for addressing emergencies.

Proposed new §299.61(d) would include language that the owner should use guidelines provided by the executive director or a format approved by the executive director before starting the plan. A guideline would provide consistency between emergency action plans. The commission determined that different guidelines will be provided depending on the size of the dam.

Proposed new §299.61(e) concerns the review method for reviewing an emergency action plan. This is necessary to provide with the process for review of the emergency action plan.

Proposed new §299.61(f) would require that the emergency action plan be filed in the agency's confidential, permanent records. The Office of the Attorney General determined in an opinion letter in 2005 that emergency action plans are considered confidential and are not subject to public information requests.

Proposed new §299.61(g) would require that the owner review the emergency action plan annually, update the emergency action plan as necessary, and submit annual updates to the executive director beginning three years after the effective date of these rules. This requirement would be necessary since personnel change and new personnel need to be trained in order to react properly during an emergency and to provide a time frame for the owner to submit any updates. Language would also be added that if the emergency action plan had been reviewed and the owner determined that no updates were necessary, the owner would be required to notify the executive director in writing if updates to the emergency action plan had not been adopted or implemented. This requirement would be necessary to ensure that the owner is reviewing the emergency action plan.

Proposed new §299.61(h) would include language requiring a table top exercise of the emergency action plan on a frequency no greater than five years. The success of an emergency action plan will often depend upon the training of employees, including periodic exercises. All parties need to know their roles and responsibilities. This requirement would be necessary for the protection of the downstream public.

Proposed new §299.62, Security of Dams, would include a requirement that owners of high-hazard dams, that may need increased security due to the critical nature of the dam and reservoir, shall address security at their dams after being notified in writing by the executive director within six months of the effective date of these rules to prevent unauthorized operation or access and meet backup power requirements to ensure operation of the dam and appurtenant structures. The requirement would be for these owners to develop a security plan within two years of being notified by the executive director and submit the plan to the executive director for review. The security plan would be filed in the confidential, permanent records of the executive director. If a request for a security plan is received, the executive director will file a request for an opinion from the Office of the Attorney General under Texas Government Code, §418.182. Over half of the dams identified by the executive director as being dams with increased security needs, have already had a security inspection and have been advised of security needs. The commission determined that security plans need to be developed on these dams because of their importance in the state. The commission also determined that backup power requirements need to be addressed by owners in the event of a power failure. This became evident during Hurricane Rita in 2005, when one owner had to operate spillway gates with backup power to prevent further damage to the dam. The commission further determined that it was necessary to provide a time frame for notifying the owners and to provide the owners time to begin the process of addressing security. Although not specifically identified in Texas Water Code, §12.052, the commission determined that security plans would be part of the maintenance of dams (preserving from failure), and therefore, they are added as a requirement in the rules.

Proposed new §299.71, Enforcement, would include language from existing §299.2(a) and existing §299.28 that would be modified to be consistent with Texas Register requirements and agency guidelines.

Proposed new §299.72, Emergency Orders, would include language from existing §299.61 that would be modified to be consistent with Texas Register requirements and agency guidelines, and to correspond with Texas Water Code, Chapter 35.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment Section, determined that, for the first five-year period the proposed new rules are in effect, significant fiscal implications are anticipated for the agency. The agency will need additional funding for review and inspection activities. Additional funding may also be needed for enforcement and support activities. Fiscal implications, which may be significant, are also anticipated for units of state or local government and individuals who own or operate high- and significant-hazard dams in the state due to the implementation or enforcement of the proposed rules.

The proposed rulemaking action repeals current rules relating to the Dam Safety Program and replaces them with new rules. The proposed new rules more closely align with federal requirements and are more consistent with accepted engineering practices. They also address criteria concerning the design, review, and approval of construction plans and specifications for dams, as well as dam operation and maintenance, inspection, repair, removal, emergency management, and site security. New requirements for emergency action plans, gate operation plans, and security plans are added and owner responsibilities are better defined. Criteria for the enforcement of rules for proposed and existing dams are also specified.

The proposed rules change the definition of a dam, thus affecting the number of dams under regulation of the agency. This change would more closely align the state definition of a dam with that of federal rules and remove approximately 5,807 small- and intermediate-size, low-hazard dams from agency inspection schedule out of a total of approximately 7,460 small, intermediate, and large dams.

However, the proposed rules would also require the remaining estimated 1,654 high- and significant-hazard dams to be inspected every five years, but of these dams, those designated to have increase security needs would have to be inspected once every two years. The annual inspection workload for the agency under the proposed rules would be approximately 453 dams per year. At this time, the Dam Safety Program uses Federal Emergency Management Agency grant funding to support a portion of its inspection activities. The agency currently contracts for the inspection of approximately 80 - 140 dams each year, and contracting services would still be needed under the proposed rules to ensure timely inspections requested by the public for low- and significant-hazard dams. Since dam owners would be required to develop and implement emergency action plans, gate operation plans, and security plans under the new rules, agency staff would also be required to review and approve these plans along with newly required annual reports on operation and maintenance, written requests for the closure of dams, and reports of changes in dam ownership. In addition, the agency must update and ensure the completeness of the dam inventory database. Current staffing levels will not permit the agency to comply with the increased inspection, plan review, and administrative requirements of the proposed rules. The agency estimates that it will need a minimum of $963,309 in the first year to add eight additional Professional Engineers, three Engineering Specialists, and one Administrative Technician to its staff in order to adequately perform the tasks required by the proposed rules. The agency would also need to request an estimated one-time cost of $250,000 in the first year to modify the Consolidated Compliance Enforcement Data System database to incorporate data pertaining to the results of Dam Safety Investigations. Total costs in year one would be approximately $1.2 million. The second year the proposed rules are in effect, the agency would need to add five additional Professional Engineers, two Engineering Specialists, and one Administrative Technician to its staff for a total of 20 staff members. Total costs for the second through fifth year the proposed rules are in effect could be as much as $1.6 million per year. Over a five-year period, funding needed is estimated to be as much as $7.6 million. The agency would be required to seek additional appropriated funds to adequately implement the proposed rules.

Units of state or local governments, including river authorities, which own or operate dams, would be affected by the new requirements of the proposed rules. In particular, requirements for emergency action plans, gate operation plans, and security plans are expected to result in additional costs, which may be significant, depending upon the size of the dam and the budget of the governmental entity. Staff estimates that there are 17 high- or significant-hazard dams owned by state agencies and approximately 985 high- or significant-hazard dams across the state owned by municipalities, counties, river authorities, water districts or soil and water conservation districts. If any of these owners do not have plans, programs, or manuals that comply with the proposed rules, staff estimates that it may cost as much as $20,000 to $30,000 per dam during the first two years to implement the proposed rules. Maintenance and inspection requirements could cost these governmental entities as much as $5,000 to $10,000 per year over the third through fifth year the proposed rules would be in effect. Total costs for state agencies and local governments over a five-year period could be as much as $35,000 to $60,000 per dam, or $35 to $60 million statewide. Local governments that have authority to increase fee revenue may choose to do so to cover the anticipated costs associated with dam maintenance or rehabilitation. However, staff experience has indicated that local governments do not increase fee revenue for maintenance and rehabilitation costs so no significant increases to the revenues of local governments are anticipated.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed new rules are in effect, the public benefits anticipated from the changes seen in the proposed rules will be greater protection of public safety due to safer and better maintained dams.

Staff has estimated that there may be as many as 219 individually owned, 407 business owned, and 26 public utility owned high- or significant-hazard dams statewide. If any of these owners do not have plans, programs, or manuals that comply with the proposed rules, staff estimates that it may cost as much as $20,000 to $30,000 per dam per year in the first two years to implement the proposed rules. Maintenance and inspection requirements could cost these governmental entities as much as $5,000 to $10,000 per year over the third through fifth year the proposed rules would be in effect. Costs over a five-year period could be as much as $35,000 to $60,000 per dam or $22.8 to $39 million statewide for business entities.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Adverse fiscal implications, some of which may be significant, are anticipated for small- or micro-businesses that own high- or significant-hazard dams. Current dam inventory data does not provide the information needed to determine how many of the 219 individually owned, 407 business owned, and 26 public utility owned high-or significant-hazard dams are owned or operated by small or micro-businesses. Small or micro-businesses would incur the same types of costs under the proposed rules as those incurred by individuals, large businesses, or local governments.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are necessary to protect public safety. These rules are similar to the federal requirements for dam safety and are necessary for all dams as defined in these rules, regardless of who owns the dams. As discussed throughout this preamble, there are no other feasible alternatives to the requirements in these rules. In addition, the proposed

rules would exempt a number of existing structures, which are more likely to be owned by small or micro-businesses, from the definition of a dam. If a small or micro-business owns or operates a high- or significant-risk dam, it must comply with the proposed rules in order to protect public safety, public property, and the environment.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission determined that a regulatory analysis under Texas Government Code, §2001.0225, is not necessary for this rulemaking since these proposed new rules do not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3). A "major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, or the public health and safety of the state or a sector of the state. The purpose of this rulemaking is to provide greater clarity in rules relating to the Dam Safety Program, and increased protection of public health and safety due to new requirements for emergency action plans, gate operations plans, security plans, and increased inspection requirements.

While these rules could result in protection of the environment, the primary intent of the rules is to protect property and human health and safety as provided under Texas Water Code, §12.052(d). These proposed new rules are also not intended to reduce risks to human health from environmental exposure, but are instead intended to reduce risks to property and humans from the failure of a dam. Revising and clarifying the dam safety rules do not have any adverse effects on the environment or public health and safety of the state or section of the state; rather, a more detailed outline of the process for classification, construction, upgrading, removal, and emergency management of dams should improve the public health and safety of the state or a sector of the state.

Even if this proposed rulemaking could be interpreted as specifically intending to protect the environment or reduce risks to human health from environmental exposure, these proposed new rules do not adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. While costs for maintenance and construction of dams may increase for many owners, improvement in dam safety will save money in the long run. The costs from dam failures could be great. These rules should not adversely impact the economy, competition, or jobs.

Additionally, even if this rulemaking could be construed to be a "major environmental rule," the rules do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement between the state and federal law, and is not adopted solely under the agency's general powers. These new rules will reflect accepted engineering practices. Based on this assessment, the proposed rulemaking does not constitute a major environmental rule that falls within the applicability of Texas Government Code, §2001.0225, and thus is not subject to the regulatory analysis provisions of §2001.0225.

The commission invites public comment regarding this draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed new rules and performed an assessment of whether these proposed new rules constitute a takings under Texas Government Code, Chapter 2007. The primary purpose of this proposed rulemaking is to provide clarity and specificity, and to add requirements reflecting the best practices of accepted engineering practices for the classification, design, construction, upgrading, repair, removal, and emergency management of dams and reservoirs. The proposed rulemaking would substantially advance these stated purposes because the proposed rules provide more detail and specificity. They do implement current engineering industry standards, such as outlining the process for removal of a dam and adding requirements for emergency action plans, gate operation plans, and security plans.

Promulgation and enforcement of these proposed new rules would be neither a statutory nor a constitutional taking of private real property. The proposed new rules do not affect a landowner's rights in private real property, in whole or in part, temporarily or permanently. These proposed new rules do not burden, restrict, or limit the owner's right to property nor will it reduce the land value by 25% or more beyond that which would otherwise exist in the absence of the proposed new rules. These proposed new rules do not change the classification of an existing dam and reservoir; instead, the proposed new rules initiate requirements upon owners, such as creating a security plan, a gate operation plan, an emergency action plan, and an operation and maintenance program. Therefore, there are no burdens imposed on private real property, and the benefits to the state are more modern dam and reservoir rules, which should result in safer dams in the State of Texas. For these reasons, the proposed new rules do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

The commission invites public comment regarding this coastal management program determination.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on August 19, 2008, at 10:00 a.m. at the Texas Commission on Environmental Quality complex at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Michael Parrish at (512) 239-2548. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Michael Parrish, MC 205, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2008-005-299-CE. Comments must be received by 5:00 p.m., August 25, 2008. Copies of the proposed rulemaking can be obtained from the commission's web site at *http://www.tceq.state.us/nav/rules/propose_adopt.html*. For further information or questions concerning this proposal, please contact Warren Samuelson, Field Operations Support Division, at (512) 239-5195.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§299.1 - 299.5

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

These repeals are proposed under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These proposed repeals implement TWC, §§5.103, 5.105, and 12.052.

§299.1. Definitions.

§299.2. General.

§299.3. Duties, Obligations, and Liabilities of Dam Owners.

§299.4. Registered Engineer.

§299.5. Exception.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 11, 2008.

TRD-200803561
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 24, 2008
For further information, please call: (512) 239-2548

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SUBCHAPTER B. DESIGN AND EVALUATION OF DAMS

30 TAC §§299.11 - 299.18

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

These repeals are proposed under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These proposed repeals implement TWC, §§5.103, 5.105, and 12.052.

§299.11. Classification of Dams.

§299.12. Size Classification Criteria.

§299.13. Hazard Classification Criteria.

§299.14. Hydrologic Criteria for Dams.

§299.15. Evaluation of Existing Dams.

§299.16. Interim Alternatives.

§299.17. Emergency Management.

§299.18. Variance.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER C. CONSTRUCTION REQUIREMENTS

30 TAC §§299.21 - 299.31

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the

Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

These repeals are proposed under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These proposed repeals implement TWC, §§5.103, 5.105, and 12.052.

§299.21. Applicability.

§299.22. Approval of Plans and Specifications.

§299.23. Content of Construction Plans and Specifications.

§299.24. Maintenance of Records.

§299.25. Construction Progress Report.

§299.26. Construction Inspection.

§299.27. Plan and/or Specification Changes and Amendments.

§299.28. Noncompliance with Approved Plans and Specifications.

§299.29. Deliberate Impoundment.

§299.30. Certificate of Completion.

§299.31. Record Drawings and Permanent Reference Mark.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER D. REMOVAL OF DAMS

30 TAC §299.51

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeal is proposed under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

The proposed repeal implements TWC, §§5.103, 5.105, and 12.052.

§299.51. Removal of Dams and Reservoirs.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER E. EMERGENCY ACTION

30 TAC §299.61

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeal is proposed under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

The proposed repeal implements TWC, §§5.103, 5.105, and 12.052.

§299.61. Emergency Action.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§299.1 - 299.7

STATUTORY AUTHORITY

These new sections are proposed under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These proposed new sections implement TWC, §§5.103, 5.105, and 12.052.

§299.1. Applicability.

(a) This chapter applies to design, review, and approval of construction plans and specifications; and construction, operation and maintenance, inspection, repair, removal, emergency management, site security, and enforcement of dams that:

(1) have a height greater than or equal to 25 feet and a maximum storage capacity greater than or equal to 15 acre-feet, as described in paragraph (2) of this subsection;

(2) have a height greater than six feet and a maximum storage capacity greater than or equal to 50 acre-feet; or
Figure: 30 TAC §299.1(a)(2)

(3) are a high- or significant-hazard dam as defined in §299.14 of this title (relating to Hazard Classification Criteria), regardless of height or maximum storage capacity.

(b) This chapter provides the requirements for dams, but does not relieve the owner from meeting the requirements in Texas Water Code (TWC), Chapter 11, and Chapters 213, 295, and 297 of this title (relating to Edwards Aquifer; Water Rights, Procedural; and Water Rights, Substantive; respectively). All applicable requirements in those chapters will still apply.

(c) This chapter does not apply to:

(1) dams designed by, constructed under the supervision of, and owned and maintained by federal agencies such as the Corps of Engineers, International Boundary and Water Commission, and the Bureau of Reclamation;

(2) embankments constructed for roads, highways, and railroads, including low-water crossings, that may temporarily impound floodwater, unless designed to also function as a detention dam;

(3) dikes or levees designed to prevent inundation by floodwater;

(4) off-channel impoundments authorized by the commission under TWC, Chapter 26; and

(5) above-ground water storage tanks.

(d) All dams must meet the requirements in this chapter, including those that are exempt from the requirements in Subchapter C of this chapter (relating to Construction Requirements) and those that are granted an exception as defined in §299.5 of this title (relating to Exception).

§299.2. Definitions.

The following words and terms in this section are in addition to the definitions in §3.2 of this title (relating to Definitions). The words and terms in this section, when used in this chapter, have the following meanings.

(1) Abandon--The owner no longer maintaining a dam for a period of ten years, or refusing to maintain the dam.

(2) Accepted engineering practices--The application of design and analysis methods that are commonly used by professional engineers in their field of expertise and are well documented in published design manuals, codes of practice, text books, and engineering journals.

(3) Alteration--Any change to a dam or appurtenant structures that affects the integrity, safety, and operation of the dam, including, but not limited to:

(A) changing the height of a dam;

(B) increasing the normal pool or principal spillway elevation, or changing the hydraulic capability of the principal spillway; or

(C) changing the original elevation, physical dimensions, or hydraulic capability of an emergency spillway.

(4) Appurtenant structures--The outlet works and controls, spillways and controls, gates, valves, siphons, access structures, bridges, berms, drains, hydroelectric facilities, instrumentation, and other structures related to the operation of a dam.

(5) Breach--An excavation or opening, either controlled of a result of a failure of the dam, through a dam or spillway that is capable of completely draining the reservoir down to the approximate original topography so the dam will no longer impound water, or partially draining the reservoir to lower impounding capacity.

(6) Breach analysis--The analyses of potential dam failure scenarios, including overtopping and piping (magnitude, duration, and location), using accepted engineering practices, to evaluate downstream hazard potential or to develop inundation maps.

(7) Breach inundation area--An area that would be flooded as a result of a dam failure.

(8) Closure of dam--The commencement of placing backfill within the closure section of the dam.

(9) Closure section--The section of the dam left open during construction of a proposed dam in order to pass floodwaters through the dam without endangering the dam.

(10) Commence construction--An actual, visible activity beyond planning or land acquisition that initiates the beginning of the construction of a dam in the manner specified in the approved construction plans and specifications for that dam. The action must be performed in good faith with the intent to continue with the construction through completion.

(11) Conceptual design--A design that presents a location and proposed plan of the dam and appurtenant structures and elevations of all pertinent features of the dam.

(12) Construction--Building a proposed dam and appurtenant structures capable of storing water.

(13) Construction change order--A document recommended by the owner's professional engineer and signed by the owner's contractor and the owner that authorizes a significant addition, deletion, or revision of the approved construction plans and specifications that has a material impact on the safety and integrity of the dam.

(14) Dam--Any barrier or barriers, with any appurtenant structures, constructed for the purpose of either permanently or temporarily impounding water.

(15) Dam failure--breach and uncontrolled release of the reservoir.

(16) Deficient dam--A dam that fails to meet the requirements of this chapter and poses a threat to human life or property.

(17) Deliberate impoundment--The intentional impoundment of water in the reservoir, including:

(A) closing the lowest planned outlet or spillway;

(B) blocking the diversion works that are used during construction to divert water around the construction area; and

(C) beginning the closure of the dam.

(18) Design flood--The flood used in the design and evaluation of a dam and appurtenant structures, particularly for determining the size of spillways, outlet works, and the effective crest of the dam.

(19) Detention dam--A dam that has an impoundment that is normally dry and has an ungated outlet structure that is designed to completely drain the water impounded during a flood within five days.

(20) Drawdown--The change in surface elevation of a reservoir due to a withdrawal of water from the reservoir.

(21) Effective crest of the dam--The elevation of the lowest point on the crest (top) of the dam, excluding spillways.

(22) Emergency action plan--A written document prepared by the owner or the owner's professional engineer describing a detailed plan to prevent or lessen the effects of a failure of the dam or appurtenant structures.

(23) Emergency repairs--Any repairs, considered to be temporary in nature, necessary to preserve the integrity of the dam and prevent a possible failure of the dam.

(24) Emergency spillway--An auxiliary spillway designed to pass a large, but infrequent, volume of flood flow, with a crest elevation higher than the principal spillway or normal operating level.

(25) Engineering inspection--Inspection performed by a professional engineer, or under the supervision of a professional engineer, to evaluate the condition, safety, and integrity of the dam and appurtenant structures to determine if the dam and appurtenant structures meet applicable rules and accepted engineering practices, including a field inspection and review of records for design, construction, and performance.

(26) Enlargement--Any change in, or addition to, an existing dam or reservoir that raises, or may raise, the normal storage capacity of the reservoir impounded by the dam.

(27) Existing dam--Any dam under construction or completed as of the effective date of these rules.

(28) Fetch--The straight-line distance across a reservoir subject to wind forces.

(29) Hazard classification--A measure of the potential for loss of life, property damage, or economic impact in the area downstream of the dam in the event of a failure or malfunction of the dam or appurtenant structures. The hazard classification does not represent the physical condition of the dam.

(30) Height of dam--The difference in elevation between the natural bed of the watercourse or the lowest point on the downstream toe of the dam, whichever is lower, and the effective crest of the dam.

(31) Inundation map--A map delineating the area that would be flooded by a particular flood event, or a dam failure.

(32) Loss of life--Human fatalities that would result from a flood-induced or piping failure of the dam, without considering evacuation or other emergency actions that could be taken.

(33) Main highways--Roads classified as a rural arterial system by the Texas Department of Transportation, including interstate highways, United States highways, and state highways.

(34) Maintenance--Those tasks that are generally recurring and are necessary to keep the dam and appurtenant structures in a sound condition, free from defect or damage that could hinder the dam's functions as designed, including adjacent areas that also could affect the function and operation of the dam.

(35) Maintenance inspection--Visual inspection of the dam and appurtenant structures by the owner or owner's representative to detect apparent signs of deterioration, other deficiencies, or any other areas of concern.

(36) Maximum storage capacity--The volume, in acre-feet, of the impoundment created by the dam at the effective crest of the dam. For purposes of calculating maximum storage capacity for the Inventory of Dams as described in §299.7 of this title (relating to Inventory of Dams), only water that can be stored above natural ground level (not in excavations in the reservoir) or that could be released by a failure of the dam is considered in assessing the storage volume. The maximum storage capacity may decrease over time due to sedimentation or increase if the reservoir is dredged.

(37) Minimum freeboard--The difference in elevation between the effective crest of the dam and the maximum water surface elevation resulting from routing the design flood appropriate for the dam.

(38) Minor highways--Roads classified as a rural collector road or rural local road by the Texas Department of Transportation, including county roads and Farm-to-Market roads not used to provide service to schools.

(39) Modification--Any structural alteration of a dam, the spillways, the outlet works, or other appurtenant structures that could influence or affect the integrity, safety, and operation of the dam.

(40) Normal storage capacity--The volume, in acre-feet, of the impoundment created by the dam at the lowest uncontrolled spillway crest elevation, or at the maximum elevation of the reservoir at the normal (non-flooding) operating level.

(41) NAD83 conus datum--The North American Datum of 1983 is a reference system used to obtain the spherical coordinates of a point on the earth's surface. The standard North American Datum of 1983 must be used for all latitude and longitude measurements.

(42) NAVD88 datum--The North American Vertical Datum of 1988 is a reference system used to obtain vertical measurements on the earth's surface. The North American Vertical Datum of 1988 must be used for all vertical measurements recorded with a global positioning system receiver.

(43) Outlet--A conduit or pipe controlled by a gate or valve, or a siphon, that is used to release impounded water from the reservoir.

(44) Owner--Any person who can be one or more of the following:

(A) holds legal possession or ownership of an interest in a dam;

(B) is the fee simple owner of the surface estate of the tract of land on which the dam is located if actual ownership of the dam is uncertain, unknown, or in dispute unless the person can demonstrate by appropriate documentation, including a deed reservation, invoice, bill of sale, or by other legally acceptable means that the dam is owned by another person or persons;

(C) is a sponsoring local organization that has an agreement with the Natural Resources Conservation Service for a dam constructed under the authorization of the Flood Control Act of 1944 (as amended), Public Law 78-534, the Watershed Protection and Flood Prevention Act, 1954 (as amended), Public Law 83-566, the pilot watershed program under the Flood Prevention of the Department of Agriculture Appropriation Act of 1954, Public Law 156-67, or Subtitle H of Title XV of the Agriculture and Flood Act of 1981, the Resource Conservation and Development Program; or

(D) has a lease, easement, or right-of-way to construct, operate, or maintain a dam.

(45) Piping--The progressive removal of soil particles from a dam by percolating water, leading to development of channels or flow paths.

(46) Principal spillway--The primary or initial spillway engaged during a rainfall runoff event that is designed to pass normal flows.

(47) Probable maximum flood (PMF)--The flood magnitude that may be expected from the most critical combination of meteorologic and hydrologic conditions that are reasonably possible for a given watershed.

(48) Probable maximum precipitation (PMP)--The theoretically greatest depth of precipitation for a given duration that is physically possible over a given size storm area at a particular geographical location at a certain time of the year.

(49) Professional engineer--An individual licensed by the Texas Board of Professional Engineers to engage in the practice of engineering in the state of Texas, with experience in the investigation, design, construction, repair, and maintenance of dams.

(50) Proposed dam--Any dam not yet under construction.

(51) Reconstruction--Removal and replacement of an existing dam or appurtenant structures.

(52) Rehabilitation--The completion of all work necessary to extend the service life of a dam and meet the safety and performance standards of this chapter.

(53) Removal--The complete elimination of a dam, the appurtenant structures, and the reservoir to the extent that no water can be impounded by the dam or reservoir and the approximate original topography of the dam and reservoir area is restored.

(54) Repairs--Any work done on a dam that may affect the integrity, safety, and operation of the dam, including, but not limited to:

(A) excavation into the embankment fill or foundation of a dam; or

(B) removal or replacement of major structural components of a dam or appurtenant structures.

(55) Reservoir--A body of water impounded by a dam.

(56) Safe manner--Operating and maintaining a dam in sound condition, free from defect or damage that could hinder the dam's functions as designed.

(57) Seal--To affix a professional engineer's seal to each sheet of construction plans or to an engineering report or required document.

(58) Secondary highways--Roads classified as a rural major collector road by the Texas Department of Transportation, including Farm-to-Market roads used to provide service to schools.

(59) Secure location--A building that is locked and accessible to the owner and owner's representative.

(60) Spillway--An appurtenant structure that conducts outflow from a reservoir.

(61) Sponsoring local organization--any political subdivision of the state, or other entity, with the authority to carry out, maintain, or operate work of improvement installed with the assistance of the federal government.

(62) Stability analysis--The analytical procedure for determining the most critical factor of safety for a slope.

(63) Substantially complete--A dam under construction that is complete except for minor correction of items identified in the final construction inspection and that can be operated in a safe manner to the dam's full functional capability.

§299.3. General.

(a) As part of an evaluation to determine if the dam and appurtenant structures constitute a significant threat to human life or property, the executive director may require the owner to obtain the services of an independent team of professional engineers or other dam experts, at the owner's expense, to determine the adequacy of the design, construction, or operation of the dam if safety considerations warrant an independent review. The requirements for use of the independent team of professional engineers or other dam experts will be included in a guideline developed by the executive director. The executive director shall submit the requirement in writing to the owner and shall provide a list of engineers and other dam experts. The owner shall submit the qualifications and size of the team to the executive director for any comments prior to beginning the independent review.

(b) When an owner submits an application for a water rights permit to either construct a dam, reconstruct, modify, enlarge, rehabilitate, alter, or repair an existing dam, or authorize an existing dam without making any changes to the dam, the owner shall submit the following:

(1) a conceptual design of the construction for a proposed dam and appurtenant structures, or proposed reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam;

(2) the geotechnical, hydrologic, and hydraulic reports for the proposed site, if the reports have been completed; and

(3) other pertinent information on an existing dam using a form provided by the executive director.

(4) The executive director shall provide a technical review of these documents as described in §281.19 of this title (relating to Technical Review).

§299.4. Professional Engineer.

(a) For all dams subject to the executive director's review under this chapter, a professional engineer shall:

(1) prepare all plans and specifications;

(2) prepare evaluations, analyses, or reports required by this chapter;

(3) observe the progress and the quality of the construction of proposed dams or reconstruction, modification, enlargement, rehabilitation, alteration, repair, or removal of existing dams to determine, in general, if the construction is proceeding according to the approved construction plans and specifications. It is understood that the professional engineer is not responsible for the contractor's means, methods, techniques, sequences, or procedures of construction selected by the contractor, or the safety precautions and programs incident to the work of the contractor; and

(4) either perform or supervise engineering inspections, as defined in §299.2 of this title (relating to Definitions), of high- and significant-hazard dams and large, low-hazard dams, as defined in §299.13 and §299.14 of this title (relating to Size Classification Criteria; and Hazard Classification Criteria; respectively).

(b) The executive director may waive these requirements based on §299.5 of this title (relating to Exception).

§299.5. Exception.

(a) The executive director may grant an exception to any or all of paragraphs (1) - (9) of this subsection if the executive director determines that the physical conditions involved or consequences of potential failure, when evaluated using accepted engineering practices, make the requirements unnecessary:

(1) §299.4 of this title (relating to Professional Engineer);

(2) §299.22 of this title (relating to Review and Approval of Construction Plans and Specifications);

(3) §299.23 of this title (relating to Maintenance of Construction Records);

(4) §299.24 of this title (relating to Construction Progress Reports);

(5) §299.25 of this title (relating to Construction Inspection);

(6) §299.26 of this title (relating to Construction Change Orders);

(7) §299.28 of this title (relating to Deliberate Impoundment);

(8) §299.30 of this title (relating to Record Drawings); and

(9) §299.31 of this title (relating to Permanent Reference Mark).

(b) The owner shall submit the request for an exception in writing to the executive director. The request may include:

(1) cost-benefit analyses;

(2) detailed engineering studies prepared by a professional engineer; and

(3) any other pertinent information.

(c) The executive director's decision to approve or deny the request for an exception must be in writing and specify the extent of the exception granted or denied and the executive director's reasons for granting or denying the exception.

§299.6. Changing Ownership of Dams.

When a change in ownership of a dam occurs, each new owner shall notify the executive director in writing within 90 days following the transaction and provide:

(1) the name, address, and telephone number of the new owner(s);

(2) the date of ownership transfer;

(3) the name and telephone number of the individual who will be responsible for operation and maintenance of the dam; and

(4) a certified copy or photocopy of instruments recorded in the office of the county clerk showing transfer of the dam to a new owner.

§299.7. Inventory of Dams.

The executive director shall maintain an inventory of dams that includes information on:

(1) ownership;

(2) physical dimensions of the dam;

(3) hazard classification;

(4) normal and maximum storage capacity;

(5) use of reservoir, including the water rights permit, if applicable;

(6) inspection date;

(7) location; and

(8) condition of the dam.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Robert Martinez
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Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2548

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SUBCHAPTER B. DESIGN AND EVALUATION OF DAMS

30 TAC §§299.11 - 299.17

STATUTORY AUTHORITY

These new sections are proposed under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103

and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These proposed new sections implement TWC, §§5.103, 5.105, and 12.052.

§299.11. General.

The executive director shall evaluate the hydrologic, hydraulic, and structural adequacy of the dam in determining whether a proposed or existing dam is considered a deficient dam.

(1) The executive director shall evaluate the hydrologic and hydraulic adequacy of the dam and spillways using the criteria in the most current version, at the time of the evaluation, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*.

(2) The executive director may also take into consideration the condition of the dam, including the possibility that the dam might be endangered by:

(A) overtopping;

(B) seepage;

(C) piping;

(D) settlement;

(E) erosion;

(F) cracking;

(G) sinkholes;

(H) earth movement;

(I) uplift;

(J) overturning;

(K) failure of gates or operation of gates;

(L) failure of spillways;

(M) failure of conduits; or

(N) other conditions, as appropriate.

§299.12. Classification of Dams.

(a) The executive director shall classify all proposed and existing dams based on size (small, intermediate, or large) and downstream hazard (low, significant, or high) and not on the physical condition of the dam.

(b) The executive director may reclassify the hazard classification of a dam at any time based on:

(1) an inspection and downstream hazard evaluation by the executive director;

(2) a report of an inspection and downstream hazard evaluation by the owner's professional engineer;

(3) a breach analysis performed by either the executive director or the owner's professional engineer as described in §299.15(a)(4)(A)(i) of this title (relating to Hydrologic and Hydraulic Criteria for Dams); or

(4) a review of current aerial photography and topographic maps, along with information obtained in the field.

§299.13. Size Classification Criteria.

The executive director shall classify dams for size based on the larger of the height of the dam or the maximum storage capacity.
Figure: 30 TAC §299.13

§299.14. Hazard Classification Criteria.

The executive director shall classify dams for hazard based on either potential loss of human life or property damage, in the event of failure or malfunction of the dam or appurtenant structures, within affected developments, that are existing at the time of the classification. The classification may include use of a breach analysis, as defined in §299.15(a)(4)(A)(i) of this title (relating to Hydrologic and Hydraulic Criteria for Dams). The classification must be according to the following.

(1) Low. A dam in the low-hazard potential category has:

(A) no loss of human life expected (no permanent inhabitable structures in the breach inundation area downstream of the dam); and

(B) minimal economic loss (located primarily in rural areas where failure may damage occasional farm buildings, limited agricultural improvements, and minor highways as defined in §299.2(38) of this title (relating to Definitions)).

(2) Significant. A dam in the significant-hazard potential category has:

(A) loss of human life possible (one to six lives or one or two inhabitable structures in the breach inundation area downstream of the dam); or

(B) appreciable economic loss, located primarily in rural areas where failure may cause:

(i) damage to isolated homes;

(ii) damage to secondary highways as defined in §299.2(58) of this title;

(iii) damage to minor railroads; or

(iv) interruption of service or use of important public utilities, including the design purpose of the utility.

(3) High. A dam in the high-hazard potential category has:

(A) loss of life expected (seven or more lives or three or more inhabitable structures in the breach inundation area downstream of the dam); or

(B) excessive economic loss, located primarily in or near urban areas where failure would be expected to cause extensive damage to:

(i) public facilities;

(ii) agricultural, industrial, or commercial facilities;

(iii) important public utilities, including the design purpose of the utility;

(iv) main highways as defined in §299.2(33) of this title; or

(v) railroads used as a major transportation system.

§299.15. Hydrologic and Hydraulic Criteria for Dams.

(a) Hydrologic criteria.

(1) Minimum hydrologic criteria for proposed dams. The following minimum hydrologic criteria includes those proposed dams to be constructed according to Texas Water Code, §11.142.

(A) A proposed dam design must meet the minimum design flood hydrograph criteria.
Figure: 30 TAC §299.15(a)(1)(A)

(B) The minimum design flood hydrograph must be based on the size and hazard classification of a proposed dam at the time of the design and calculated using the criteria in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines of Dams in Texas*.

(C) Proposed dams and spillways or dams and spillway to be reconstructed, modified, enlarged, rehabilitated, or altered using hydrologic procedures of the Natural Resources Conservation Service will be acceptable, provided that the procedures are shown to be equal to or more conservative than the procedures provided in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*.

(2) Exemptions to minimum hydrologic criteria for proposed dams. Any dam designed to withstand overtopping without failure of the dam, including the foundation and abutments, as demonstrated by studies prepared by the owner's professional engineer will be exempt from the minimum hydrologic criteria.

(3) Minimum hydrologic criteria for existing dams. The following criteria applies to dams that existed before the effective date of this subchapter.

(A) An existing dam that was required to meet 100% of the probable maximum flood (PMF) before the effective date of these rules and is shown by an evaluation by a professional engineer to meet 75% or more of the PMF will not be required to be upgraded to meet minimum hydrologic criteria in paragraph (1)(A) of this subsection and the dam will be considered adequate to meet the minimum hydrologic criteria, provided the owner:

(i) has an emergency action plan that meets the requirements in §299.61 of this title (relating to Emergency Action Plans);

(ii) has an operation and maintenance program for the dam as described in §299.43 of this title (relating to Operation and Maintenance);

(iii) has an inspection program that has been implemented as described in §299.42 of this title (relating to Inspections); and

(iv) submits an annual report to the executive director documenting compliance with the requirements in clauses (ii) and (iii) of this subparagraph, beginning 12 months after the effective date of this section.

(B) A dam that was required to meet the minimum hydrologic criteria before the effective date of these rules, but is shown by an evaluation by a professional engineer to meet the minimum hydrologic criteria in paragraph (1)(A) of this subsection, will not be required to be upgraded and the dam will be considered adequate to meet the minimum hydrologic criteria.

(C) An existing dam that does not meet the minimum hydrologic criteria in paragraph (1)(A) of this subsection or the size or hazard classification has been raised and the dam does not meet the minimum hydrologic criteria in paragraph (1)(A) or this subsection for the new size or hazard classification may require that the owner submit to the executive director any of the following, prepared by a professional engineer:

(i) final construction plans and specifications as described in §299.22 of this title (relating to Review and Approval of Construction Plans and Specifications) for modifying, enlarging, or altering the dam or spillways to meet the minimum hydrologic criteria as described in paragraph (1)(A) of this subsection;

(ii) an analysis or other option to request a reduction in the minimum hydrologic criteria as described in paragraph (4) of this subsection; or

(iii) a plan for alternatives to upgrading as described in §299.17 of this title (relating to Alternatives to Upgrading Dams).

(D) An existing dam that meets the requirements of subparagraph A of this paragraph and is required to be modified due to structural deficiencies shall be required for the owner to submit to the executive director final construction plans and specifications for the structural modifications as described in §299.22 of this title. The dam will not be required to be upgraded to meet the minimum design criteria in paragraph (1)(A) of this subsection.

(4) Reduction of minimum hydrologic criteria. The minimum hydrologic criteria may be reduced as follows.

(A) The owner may request that the executive director reduce the minimum hydrologic criteria if the owner submits:

(i) dam breach analysis, prepared by a professional engineer and using the normal storage capacity non-flood event, the barely overtopping flood event, and the PMF event, if applicable, that demonstrate existing downstream improvements would not be adversely affected, which is defined as the downstream flooding differentials being less than or equal to one foot between breach and non-breach simulations in the affected area;

(ii) one or more technical options included in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines of Dams in Texas*, demonstrating that existing downstream improvements would not be adversely affected;

(iii) documentation of the purchase, or an easement for, the property downstream of the dam that would be impacted by a dam failure and showing that it has been dedicated to non-residential and non-commercial use; or

(iv) documentation that the property downstream has been dedicated by the property owner to non-residential and non-commercial use.

(B) The executive director shall evaluate the owner's request for reduction in the minimum hydrologic criteria to determine if the request is appropriate. If the executive director agrees with the analysis, the executive director shall approve the request in writing.

(C) If the executive director does not agree with the owner's request for reduction in the minimum hydrologic criteria, the executive director shall deny the request in writing.

(b) Hydraulic criteria for proposed dams or dams proposed to be reconstructed, modified, enlarged, rehabilitated, or altered.

(1) The owner shall have a professional engineer evaluate the hydraulic adequacy of the dam and spillways using the guidelines in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines of Dams in Texas*.

(2) The owner shall have a professional engineer address the stability of the spillways to determine if the spillways will adequately meet the minimum design storm without being significantly damaged.

(3) The owner shall have a professional engineer determine a minimum freeboard for a proposed large size dam as defined in §299.13 of this title (relating to Size Classification Criteria) as outlined

in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*.

(c) Hydraulic criteria for existing dams. If it becomes necessary for an owner of an existing dam to reevaluate the hydraulic adequacy of the dam and spillways, the owner shall have a professional engineer evaluate the hydraulic adequacy of the dam and spillways using the guidelines in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines of Dams in Texas*.

§299.16. Structural Evaluation of Dams.

(a) The owner shall have a professional engineer submit a geotechnical, geological, and structural evaluation in a report to the executive director with the final construction plans and specifications as described in §299.22 of this title (relating to Review and Approval of Construction Plans and Specifications) to support the design of a proposed dam or a dam that is proposed to be reconstructed, or structurally modified, enlarged, rehabilitated, or altered. The report must include, as applicable:

(1) details of the geology of the project site and vicinity;

(2) location and logs of test borings, pits, and shafts;

(3) results of field and laboratory tests on structural and foundation materials;

(4) seepage studies;

(5) stability analyses of embankments, spillways, retaining walls, and inlet structures, as described in subsection (b) of this section; and

(6) recommendations concerning:

(A) embankment slopes, crest width, and berms;

(B) core trench size and depths;

(C) moisture-density and strength requirements;

(D) soil dispersion requirements;

(E) minimum compressive strength for concrete;

(F) construction sequence procedures and techniques for excavations and embankments;

(G) types of compaction equipment; and

(H) seepage control requirements.

(b) The owner shall have a professional engineer develop a stability analysis as outlined in the most current version, at the time of the analysis, of the agency's *Design and Construction Guidelines for Dams in Texas* to support the design of proposed large- and intermediate-size dams, as defined in §299.13 of this title (relating to Size Classification Criteria), and large- and intermediate-size dams that are proposed to be reconstructed or structurally modified, enlarged, rehabilitated, or altered. The analysis must be submitted to the executive director with the final construction plans and specifications as described in §299.22 of this title.

(c) The executive director may require the owner of an existing dam to have a professional engineer perform a geotechnical and structural evaluation or a stability analysis and submit a report, as described in subsections (a) and (b) of this section, following an inspection, as described in §299.42 of this title (relating to Inspections), if the executive director determines that the dam was found to be deficient and the integrity of the dam was threatened. If the owner has a professional engineer prepare a report, the owner shall submit the professional engineer's report to the executive director for review upon completion of the report.

(d) When a person proposes one of the following activities near the owner's dam, the owner or the executive director may request that the person have a professional engineer perform an evaluation to determine if the integrity of the dam would be compromised. If the person has a report prepared by a professional engineer, the person shall submit the evaluation report to the executive director and the owner for review and approval before any work is performed for a proposal to:

(1) dredge the reservoir within 200 feet of the dam;

(2) install a utility line or pipeline in the dam or in the spillways that requires significant excavation in the dam or spillways;

(3) construct a road across the dam or spillways or within 200 feet of the dam;

(4) drill oil or gas wells or perform oil or gas exploration within 200 feet of the dam and spillways; or

(5) blast within 1/2 mile of the dam.

§299.17. Alternatives to Upgrading Dams.

(a) An owner may elect to implement alternative methods, instead of upgrading the dam using structural methods, to meet minimum hydrologic criteria by submitting to the executive director:

(1) a plan for meeting the requirements in §299.15(a)(3) of this title (relating to Hydrologic and Hydraulic Criteria for Dams);

(2) a plan for meeting the requirements in §299.15(a)(4) of this title;

(3) a plan for removing the dam, as described in §299.51 of this title (relating to Removal or Breach of Dams);

(4) a plan for lowering the reservoir level to a level that will allow it to meet the appropriate minimum hydrologic criteria; or

(5) a plan using a combination of structural and non-structural methods as proposed by the owner's professional engineer.

(b) The executive director shall review the owner's proposal and respond as described in §299.22(e) of this title (relating to Review and Approval of Construction Plans and Specifications).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2548

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SUBCHAPTER C. CONSTRUCTION REQUIREMENTS

30 TAC §§299.21 - 299.33

STATUTORY AUTHORITY

These new sections are proposed under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the envi-

ronment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These proposed new sections implement TWC, §§5.103, 5.105, and 12.052.

§299.21. Applicability.

(a) This subchapter applies only to construction requirements, including submittal, review, and approval of engineering plans and specifications, inspections, reports, and records, for the construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam:

(1) requiring a water rights permit authorization;

(2) requiring an Edwards Aquifer protection plan;

(3) originally designed and constructed with the assistance and written concurrence of the Natural Resources Conservation Service under authorization of the Flood Control Act of 1944 (as amended), Public Law 78-534, the Watershed Protection and Flood Prevention Act of 1954 (as amended), Public Law 83-566, the pilot watershed program under the Flood Prevention of the Department of Agriculture Appropriation Act of 1954, Public Law 156-67, or Subtitle H of Title XV of the Agriculture and Flood Act of 1981, the Resource Conservation and Development Program, but being proposed to be reconstructed, modified, enlarged, rehabilitated, altered, or repaired without the assistance and written concurrence of the Natural Resources Conservation Service;

(4) used for temporary detention purposes and impounding a maximum storage capacity of 200 acre-feet or more; or

(5) that is small and classified as either significant- or high-hazard, as defined in §299.13 and §299.14 of this title (relating to Size Classification Criteria; and Hazard Classification Criteria; respectively), and exempt from a water rights permit under Texas Water Code, §11.142.

(b) This subchapter does not apply to:

(1) dams for which an exception is approved according to §299.5 of this title (relating to Exception) to the extent for which the exemption is granted;

(2) proposed dams designed and constructed, or existing dams designed and modified, rehabilitated, or repaired, with the assistance and written concurrence of the Natural Resources Conservation Service under authorization of the Flood Control Act of 1944 (as amended), Public Law 78-534, the Watershed Protection and Flood Prevention Act of 1954 (as amended), Public Law 83-566, the pilot watershed program under the Flood Prevention of the Department of Agriculture Appropriation Act of 1954, Public Law 156-67, or Subtitle H of Title XV of the Agriculture and Flood Act of 1981, the Resource Conservation and Development Program;

(3) proposed dams designed and constructed, or existing dams designed and modified, rehabilitated, or repaired for mining purposes and approved and inspected by the Mine Safety and Health Administration;

(4) small, low-hazard dams, as defined in §299.13 and §299.14 of this title, exempted from a water rights permit under Texas Water Code, §11.142; and

(5) maintenance or emergency repairs, as defined in §299.2 of this title (relating to Definitions).

§299.22. Review and Approval of Construction Plans and Specifications.

(a) General.

(1) The owner shall submit final construction plans and specifications, which are sealed, signed, and dated by a professional engineer, to the executive director for review and approval before commencing construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam. Emergency repairs are defined in §299.2(23) of this title (relating to Definitions) and §299.45 of this title (relating to Emergency Repairs).

(2) The executive director shall not issue approval of final construction plans and specifications for construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam until a water rights permit or an Edwards Aquifer protection plan, if required, is issued.

(3) The executive director shall not issue approval of final construction plans and specifications for construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam unless the plans and specifications include language, or design criteria, that requires the proposed contractor to develop a Storm Water Pollution Prevention Plan and submit a Notice of Intent (NOI) for coverage under the State of Texas Construction General Permit (TXR150000), if applicable.

(4) The owner shall not allow construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam to be commenced before the executive director's review of the final construction plans, specifications, and other engineering reports and the owner receives written approval of the final construction plans and specifications. The owner shall provide a copy of the executive director's written approval to the contractor before commencing construction.

(5) Construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam shall be performed according to the final construction plans and specifications approved by the executive director unless construction change orders have been approved as indicated in §299.26 of this title (relating to Construction Change Orders).

(b) Construction plans.

(1) Construction plans for proposed dams must be 22 inches by 34 inches in size. The plans may be reduced to 11 inches by 17 inches in size if all details are clearly legible and an accurate scale is included. A scale must be included on all sheets of the construction plans. The plans must include the following, as applicable:

(A) a vicinity map that shows the location of the proposed dam and appurtenant structures with respect to:

(i) boundaries of political subdivisions;

(ii) streams;

(iii) highways;

(iv) railroads;

(v) pipelines;

(vi) transmission lines; and

(vii) utilities;

(B) a topographic map of the dam site with:

(i) contour intervals not to exceed five feet;

(ii) latitude and longitude (in decimal degrees to six decimal places) of the midpoint of the dam using the North American Vertical Datum of 1988 conus datum; and

(iii) a superimposed plan of the dam showing the locations of any:

(I) spillways;

(II) outlet conduit;

(III) borings and test pits;

(IV) possible borrow areas; and

(V) other structures.

(C) a profile of the dam site taken on the long axis of the dam showing:

(i) the location of the outlet conduit and each spillway;

(ii) the proposed bottom of the core trench; and

(iii) elevations of all features.

(D) a profile of each spillway along its long axis;

(E) a log of all borings showing the classification of materials encountered below the surface, if not provided in a separate geotechnical report;

(F) a cross section of the dam at maximum section showing complete details and dimensions;

(G) detailed sections of outlet conduits, control works, and spillways with a sufficient number and detail to delineate all of these features;

(H) the proposed location of all permanent instrumentation, pressure cells, settlement plates, piezometers, inclinometers, slope indicator casings, data acquisition systems, or other devices;

(I) the requirements, or design criteria, for the proposed contractor to develop a Storm Water Pollution Prevention Plan and submit a NOI, if applicable, or authorization under TXR150000; and

(J) other design standards as described in the most current version, at the time of the design, of the agency's *Design and Construction Guidelines for Dams in Texas*.

(2) Construction plans for the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of existing dams must be 22 inches by 34 inches in size. The plans may be reduced to 11 inches by 17 inches in size if all details are clearly legible and an accurate scale is included. A scale must be included on all sheets of the construction plans. The plans must include the following, as applicable:

(A) a vicinity map that shows the location of the dam and spillways with respect to:

(i) boundaries of political subdivisions;

(ii) streams;

(iii) highways;

(iv) railroads;

(v) pipelines;

(vi) transmission lines; and

(vii) utilities.

(B) detailed sections of the dam, spillways, outlet conduit, or control works being enlarged, altered, or repaired with sufficient detail to delineate the work to be performed;

(C) a log of all borings, if necessary, showing the classification of materials encountered below the surface, if not provided in a separate geotechnical report;

(D) the requirements, or design criteria, for the proposed contractor to develop a Storm Water Pollution Prevention Plan and submit a NOI, if applicable or authorization under TXR150000; and

(E) other design criteria as described in the most current version, at the time of the design, of the agency's *Design and Construction Guidelines for Dams in Texas*.

(c) Specifications. The specifications must include the following:

(1) the requirements for the various types of materials to be used in the construction or reconstruction, modification, enlargement, rehabilitation, alteration, or repair of the dam, spillways, outlet conduits, and control works;

(2) a provision that plans and specifications will not be substantially changed without either written approval of the executive director before the work is started, or notification of the changes as defined in §299.26 of this title;

(3) a requirement that the proposed contractor develop and implement a Storm Water Pollution Prevention Plan, if applicable, and submit an NOI for authorization under TXR150000; and

(4) other design specifications as described in the most current version, at the time of the design, of the agency's *Design and Construction Guidelines for Dams in Texas*.

(d) Engineering reports and plans.

(1) Engineering reports that may be required by the executive director for review include:

(A) a geotechnical, geological, and structural evaluation report that includes the information described in §299.16 of this title (relating to Structural Evaluation of Dams);

(B) a stability analysis for proposed large- and intermediate-size dams as defined in §299.13 of this title (relating to Size Classification Criteria), and large- and intermediate-size dams that are proposed to be reconstructed or structurally modified, enlarged, rehabilitated, or altered, as described in §299.16 of this title;

(C) a hydrologic and hydraulic report for proposed dams and dams that are to be reconstructed, modified, enlarged, rehabilitated, altered, or repaired, that includes the information described in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*;

(D) a report on proposed instrumentation for proposed large dams and existing large dams, as defined in §299.13 of this title, that are to be reconstructed, modified, enlarged, rehabilitated, altered, or repaired. This report must include:

(i) types and locations of proposed instrumentation;

(ii) depths of instrumentation; and

(iii) frequency and duration of data collection; or

(E) any reports prepared for addressing site-specific conditions and recommendations.

(2) Engineering plans that may be required by the executive director for review include:

(A) a quality control and assurance plan for all proposed dams. This plan must include:

(i) designation and qualifications of the on-site inspector(s);

(ii) designation of a testing laboratory;

(iii) types and frequency of tests to be conducted; and

(iv) a construction schedule.

(B) a plan for closure of any proposed dam that requires a closure section. This plan must include:

(i) the amount of construction that would need to be completed before closure would start;

(ii) the sequence to be followed during closure; and

(iii) the estimated time to complete closure.

(C) a plan for addressing possible emergencies that threaten the integrity of the dam for all proposed high- and significant-hazard dams during construction. This plan must include:

(i) a flow chart for notification of emergency management officials and the downstream public;

(ii) identification of possible emergencies that could occur during construction and potential consequences;

(iii) technical requirements for addressing any possible emergencies; and

(iv) responsibilities of all parties.

(e) Review and approval process.

(1) The executive director shall review the final construction plans, specifications, and engineering reports and plans according to the most current version, at the time of the design, of the agency's *Design and Construction Guidelines for Dams in Texas*.

(2) If the final construction plans and specifications meet the requirements of this chapter and accepted engineering practices, the executive director shall issue written approval to the owner unless the plans and specifications are for a proposed dam and have been submitted as part of the application for a water rights permit or for an Edwards Aquifer protection plan.

(A) If the final construction plans and specifications are for a proposed dam and have been submitted as part of the application for a water rights permit, the executive director shall advise the owner that the plans and specifications meet the requirements of this chapter and accepted engineering practices. However, the executive director shall not issue written approval of the final construction plans and specifications until the water rights permit is issued and a time limitation section, in compliance with Texas Water Code, Chapter 11, has been added to the water rights permit requiring construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam to be started and completed within specified time frames.

(B) If the final construction plans and specifications are for a proposed dam and have been submitted as part of the application for an Edwards Aquifer protection plan, the executive director shall not issue written approval of the final construction plans and specifications until the Edwards Aquifer protection plan is issued by the appropriate regional office.

(3) If the final construction plans and specifications do not meet the requirements of this chapter, the executive director shall provide the owner written comments on the items needing revision.

(4) After receipt of the revised final construction plans and specifications or an addendum to the plans and specifications, the executive director shall review and issue written approval to the owner if all requirements in this chapter and accepted engineering practices have been met.

(5) If all requirements still have not been met, the executive director shall either provide the owner written comments on the items still needing revision or schedule a meeting with the owner to discuss the items needing revision.

(6) Upon submission of the revised, and agreed on, final construction plans and specifications or an addendum to the plans and specifications, the executive director shall issue written approval to the owner if applicable rules and accepted engineering practices have been met.

(f) Time limitations on approval of final construction plans and specifications.

(1) If construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam is not commenced within four years of the executive director's approval of final construction plans and specifications, the approval will be subject to reevaluation. If rules, regulations, and accepted engineering practices or the downstream hazard classification have changed during the four-year period, the approval may be considered invalid regardless of any extension of time authorizations given according to Chapter 295 of this title (relating to Water Rights, Procedural) and Chapter 297 of this title (relating to Water Rights, Substantive).

(2) If the executive director determines that the approval is invalid, the executive director shall notify the owner in writing that new construction plans, specifications, and other engineering reports must be submitted before the work may commence.

(3) The new construction plans and specifications must meet the requirements of the rules and regulations in effect at the time of the reevaluation.

§299.23. Maintenance of Construction Records.

(a) The owner shall maintain construction records during construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam, which include:

(1) approved construction plans and specifications;

(2) approved construction change orders;

(3) construction test results as described in subsection (b) of this section;

(4) approval letters; and

(5) construction inspection reports and other engineering reports that may be developed during construction.

(b) The owner shall furnish copies of the construction test results for high- and significant-hazard dams to the executive director for review at least once a month during the construction period to document compliance with the approved plans and specifications and the requirements in this chapter. The test results to be submitted must include:

(1) soil moisture-density test results;

(2) soil dispersion test results; and

(3) concrete trial batch design test and compression test results.

(c) The owner shall also record:

(1) final bottom width and elevations of core and cutoff trenches;

(2) structural excavations;

(3) documentation of permanent sheet piles or bearing piles; and

(4) documentation of foundation grouting, de-watering problems, or observations during the construction period of any instruments installed to measure movements, stresses, and pore pressure.

(d) The owner shall maintain the construction records as described in subsections (a) - (c) of this section in a secure location at the construction site or at a location designated by the owner that is immediately accessible to the owner until the completion of construction.

(e) After completion of construction, the owner shall transfer the construction records in subsections (a) - (c) of this section to a permanent, secure location designated by the owner that is immediately accessible to the owner as described in §299.46 of this title (relating to Records).

§299.24. Construction Progress Reports.

(a) The owner shall have a professional engineer provide the following information to the executive director in writing within ten working days after construction on the dam commences:

(1) the actual start date;

(2) the contractor's name and address; and

(3) the name and telephone number of the professional engineer or inspector that will be on site during construction.

(b) The owner shall have a professional engineer submit monthly reports of progress on high- and significant-hazard dams to the executive director by the tenth of each month during construction. The report must include:

(1) the work accomplished during the month;

(2) the percent of the contract time used;

(3) the percentage of completion of the project on the date of the report;

(4) a description of problem areas encountered during construction;

(5) the dates of the reporting period; and

(6) any changes in the contact information.

§299.25. Construction Inspection.

(a) The owner shall have a professional engineer, or a qualified inspector, provided the inspector is under the direct supervision of the owner's professional engineer, conduct inspections of the construction work to determine if the work is in compliance with approved construction plans, specifications, and accepted engineering practices.

(b) The executive director may make periodic inspections of the construction to determine if the dam is in compliance with approved plans and specifications. If the executive director's inspection reveals that the dam is not being constructed according to the approved construction plans and specifications, the executive director shall notify the owner by telephone and in writing as outlined in the most current version, at the time of the evaluation, of the agency's *Design and Construction Guidelines for Dams in Texas* of the deficiency items or violations noted. The executive director shall direct the owner to take the necessary action to bring the project into compliance with the approved plans and specifications within 30 days after being notified.

(c) The owner, at the owner's expense, shall submit documentation of the work or tests performed or sufficient information to enable the executive director to determine if conformity with approved plans and specifications is accomplished.

§299.26. Construction Change Orders.

(a) The owner shall submit any proposed changes to the approved construction plans and specifications to the executive director for review and approval as a construction change order as defined in §299.2(13) of this title (relating to Definitions). The construction change order must be signed, sealed, and dated by a professional engineer.

(b) The owner shall submit a construction change order before work starts on the proposed changes, if possible. If there is an emergency requiring immediate action, a construction change order may be submitted after the work is performed. However, the owner or the owner's professional engineer shall inform the executive director by telephone or electronic mail of the action being taken as soon as the situation allows, but no later than 24 hours after becoming aware of the emergency or the need for a change order. If the time needed for an approval of a change order will require that the construction be halted, the work may be performed once the construction change order is signed, sealed, and dated by the owner's professional engineer and submitted for review. However, if the construction change order is not approved, the owner shall be responsible for having any work performed or modified to reflect the approved construction change order, as needed.

(c) The executive director shall review a construction change order according to the most current version, at the time of the review, of the agency's *Design and Construction Guidelines for Dams in Texas*.

(d) The executive director may request that the owner submit a construction change order if, during construction, the executive director finds that changes to the construction plans and specifications are necessary to ensure the integrity of the dam.

(e) If the proposed construction change order would result in a change in the permitted water rights, the owner shall submit an application for an amendment of the water rights permit.

§299.27. Closure of Dam.

(a) The owner shall have a professional engineer submit a written request to close the dam to the executive director for approval as described in the most current version, at the time of the closure, of the agency's *Design and Construction Guidelines for Dams in Texas* before beginning closure of the dam. The request must include:

(1) a copy of the owner's emergency action plan; and

(2) documentation that all parts of the proposed plan for closure of the dam, as described in §299.22(d)(2)(B) of this title (relating to Review and Approval of Construction Plans and Specifications), have been met.

(b) The owner may begin closure of the dam after receiving written approval from the executive director.

(c) The owner shall notify the executive director in writing that the gate operation plan has been completed with the request for closure of the dam as described in §299.32 of this title (relating to Gate Operation Plan).

§299.28. Deliberate Impoundment.

(a) The owner of a dam and reservoir designed to impound more than 1,000 acre-feet at normal storage capacity shall submit a written request to the executive director to begin deliberate impoundment of water, as defined in §299.2(17) of this title (relating to Definitions). The owner shall submit a letter from the owner's professional engineer stating that the dam is substantially complete.

(b) The owner may begin deliberate impoundment after receiving written approval from the executive director.

§299.29. Notification of Completion.

(a) The owner shall have the professional engineer of record submit written notification, which is sealed, signed, and dated, to the executive director within 45 calendar days after the work is substantially completed on the construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam. This notification may be submitted separately from the record drawings.

(b) The owner's professional engineer shall state that, to the best of the professional engineer's knowledge, the construction or reconstruction, modification, enlargement, rehabilitation, alteration, or repair was completed in substantial compliance with the approved plans and specifications and any approved construction change orders.

(c) For projects excepted under §299.5 of this title (relating to Exception), the owner shall notify the executive director in writing that construction or reconstruction, modification, enlargement, rehabilitation, alteration, or repair was completed.

§299.30. Record Drawings.

(a) Within six months after final completion of construction, the owner shall submit to the executive director a complete set of record drawings of the project for filing with the permanent records. These record drawings must show all revisions made during construction, including the permanent reference mark(s); be sealed, signed, and dated by the professional engineer; and be identified as final record drawings.

(b) If no changes were made during construction, the owner may submit in writing a statement, which is signed, sealed, and dated by the professional engineer, that no changes were made during construction.

§299.31. Permanent Reference Mark.

The owner of a proposed dam or a dam proposed to be reconstructed, modified, enlarged, rehabilitated, altered, or repaired shall have the professional engineer of record establish one or more permanent reference mark(s) for future use near, but separate from, the project. Accurate location(s) and elevation(s) above mean sea level for the permanent reference mark(s) must be shown on the record drawings. Horizontal and vertical measurements recorded with a global positioning system (GPS) receiver must be based on the North American Datum of 1983 and the North American Vertical Datum of 1988 horizontal and vertical reference datums. Elevation data must be recorded using a survey instrument or survey grade GPS receiver. Latitude and longitude measurements must be provided in decimal degrees to six decimal places.

§299.32. Gate Operation Plan.

The owner shall have a professional engineer develop a gate operation plan, as described in §299.44(c) of this title (relating to Gate Operation Plan), for the owner of a proposed dam with a gated principal spillway before completion of construction.

§299.33. Operation and Maintenance.

(a) The owner shall develop operation and maintenance procedures as described in §299.43 of this title (relating to Operation and Maintenance) for all proposed dams before completion of construction.

(b) If applicable, the owner shall provide the date that the owner will turn over the operation and maintenance of the dam to a property owner association, homeowner association, or other designated group and the new contact information in writing to the executive director.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Robert Martinez
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For further information, please call: (512) 239-2548

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SUBCHAPTER D. OPERATION AND MAINTENANCE OF DAMS

30 TAC §§299.41 - 299.46

STATUTORY AUTHORITY

These new sections are proposed under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These proposed new sections implement TWC, §§5.103, 5.105, and 12.052.

§299.41. Owner's Responsibilities.

(a) The owner shall be responsible for operating and maintaining the dam and appurtenant structures in a safe manner.

(b) The owner shall be responsible for addressing all maintenance and safety concerns at the dam and appurtenant structures identified during any inspections conducted by the executive director or the owner.

(c) The owner shall ensure that necessary maintenance, repairs, alterations, or modifications are initiated and completed in a timely manner following any inspection.

(d) Nothing in this chapter or in orders issued by the commission shall be construed to relieve an owner of a dam or reservoir of the legal duties, obligations, or liabilities incident to ownership or operation.

§299.42. Inspections.

(a) Periodic engineering inspections by the executive director.

(1) The executive director may enter any person's property at any time for the purpose of inspecting any dam to determine if the dam is being maintained in a safe manner.

(2) The executive director shall perform periodic engineering inspections of dams based on hazard classification, as defined in §299.14 of this title (relating to Hazard Classification Criteria), on the following frequency.

(A) High-hazard dams shall be inspected once every five years.

(B) Significant-hazard dams shall be inspected once every five years.

(C) Large dams, as defined in §299.13 of this title (relating to Size Classification Criteria), in the low-hazard classification shall be inspected once every five years.

(D) Small and intermediate dams, as defined in §299.13 of this title, in the low-hazard classification shall not be included in the periodic inspection program. These dams may be inspected for the purposes of:

(i) determining hazard classification;

(ii) assessing condition of the dam following an emergency such as a flooding event;

(iii) assessing condition of the dam that could threaten the integrity of the dam as a result of a request by the owner;

(iv) assessing the condition of the dam as a result of a complaint; or

(v) assessing the condition of a dam as a result of a request from someone other than the owner.

(3) The executive director's engineering inspection may consist of:

(A) conducting a visual inspection and evaluation of the condition of the dam and appurtenant structures, the downstream area, and any other areas affected by the dam;

(B) taking measurements of elevations, dimensions, slopes, and locations of the dam and appurtenant structures;

(C) taking photographs for documentation;

(D) conducting an evaluation of the hazard classification to determine if the classification should be changed as a result of the inspection;

(E) reviewing and evaluating the owner's operation, maintenance, and inspection programs and all other records; and

(F) reviewing the owner's emergency action plan, including the gate operation plan if applicable.

(4) The executive director shall prepare a written inspection report that provides the findings from the inspection and lists recommendations for actions to be taken to assist the owner in maintaining the continued integrity, safety, and operation of the dam. The executive director may require the owner to have the owner's professional engineer perform hydrologic, hydraulic, or structural evaluations of the dam as described in Subchapter B of this chapter (relating to Design and Evaluation of Dams). The executive director shall provide the owner with a copy of the written report, or letter, as soon as practical after the inspection.

(5) The owner shall provide a written response to the executive director, if requested, and include a plan of action with time frames for addressing all of the executive director's recommendations from the inspection.

(b) Inspections by the owner.

(1) The owner, or the owner's representative, shall inspect the dam and appurtenant structures on a regular time frame as part of the owner's operation and maintenance procedures, as defined in §299.43 of this title (relating to Operation and Maintenance), following significant rainfall events, and during emergency events as described in §299.61 of this title (relating to Emergency Action Plans). The owner or the owner's representative shall perform maintenance inspections at least once a year.

(2) The owner shall notify the executive director by telephone or electronic mail within 24 hours and in writing within five days after becoming aware of any problems or damage that pose a threat to the dam's safety, integrity, or operation.

(3) The owner shall submit a copy of all engineering inspection reports prepared by the owner's professional engineer under this section to the executive director for review within 45 calendar days after receipt of the report from the professional engineer. The report prepared by the owner's professional engineer must consist of the inspection date, description of the items observed during the inspection, the findings, and recommendations.

(4) The owner may elect to have an engineering inspection by a professional engineer more frequently than described in subsection (a)(2) of this section. The executive director may use the engineering inspection report prepared for the owner by the professional engineer in lieu of making a periodic inspection as described in subsection (a)(2) of this section. A report prepared by a professional engineer with the Federal Energy Regulatory Commission, Natural Resources Conservation Service, Bureau of Reclamation, Corps of Engineers, or Mine Safety and Health Administration may also be used in lieu of the periodic inspection described in subsection (a)(2) of this section.

§299.43. Operation and Maintenance.

(a) The owners of all dams shall develop and implement an operation and maintenance program. The owner may use the most current version, at the time of the plan development, of the agency's *Guidelines for Operation and Maintenance of Dams in Texas*, manual, a checklist, or some other procedure to demonstrate implementation of the program. Operation and maintenance activities that must be addressed include, but are not limited to:

(1) the schedules for both engineering and maintenance inspections performed by the owner or the owner's professional engineer;

(2) any restrictions imposed by the original professional engineer's design;

(3) a list of maintenance items and a schedule for addressing each item, including:

(A) replacing riprap;

(B) eliminating animal burrows;

(C) removing blockage from the principal spillway inlet and outlet structures and removing obstructions from the emergency spillways, including fences;

(D) lubricating, repairing, painting, and exercising gates or valves, if in working condition, or if applicable;

(E) removing corrosion on gates and other metal appurtenant structures;

(F) sealing of cracks and joints in concrete;

(G) preventing or controlling erosion, including animal and vehicular trails and wave action erosion;

(H) eliminating small trees (less than or equal to four inches in diameter) and brush on the dam and all trees and brush in the spillways and adjacent to concrete structures;

(I) maintaining adequate grass cover on earthen dams and spillways;

(J) maintaining proper function of foundation or toe drains; and

(K) correcting any other items that may impact the dam or appurtenant structures; and

(4) if applicable, a plan for monitoring instrumentation in the dam and appurtenant structures, to include:

(A) a list of all types of instruments, instrument number, and locations;

(B) schedules and procedures for reading and maintenance of each instrument; and

(C) a list of critical readings for each instrument and the process to follow if critical readings are measured.

(b) The owner shall document operation and maintenance activities undertaken and shall provide the documentation to the executive director for review as soon as possible upon request of the executive director.

§299.44. Gate Operation Plan.

(a) The owners of all existing intermediate- and large-size dams, as defined in §299.13 of this title (relating to Size Classification Criteria), with gated principal spillways shall have their professional engineer develop a gate operation plan within two years after the effective date of the rules. The owner's professional engineer shall notify the executive director in writing that the gate operation plan has either been completed or a gate operation plan exists that meets the requirement of this section.

(b) The gate operation plan must include:

(1) gate procedures for use during normal operating conditions, flood events, and power failures; and

(2) a method for coordinating releases with owners of other dams in the river basin, if applicable.

(c) The gate operation plan shall be considered an appendix to the owner's emergency action plan. If the owner submits a copy of the gate operation plan to the executive director, the executive director shall file it with the owner's emergency action plan in the agency's confidential, permanent records.

§299.45. Emergency Repairs.

(a) The owner shall undertake emergency repairs under the supervision of a professional engineer and implement the emergency action plan as soon as possible after the emergency is discovered and evaluated. The owner may start emergency repairs without approval from the executive director.

(b) The owner shall notify the executive director by telephone or electronic mail of the action being taken as soon as the emergency situation allows, but no more than 12 hours after the emergency is discovered and evaluated.

(c) The owner shall have a professional engineer develop plans for permanent repairs as soon as the emergency is over. The owner shall have a professional engineer submit the plans for review and approval, as described in §299.22 of this title (relating to Review and Approval of Construction Plans and Specifications).

§299.46. Records.

(a) All owners shall maintain records, if available, on the inspection, operation, and maintenance of their dams, including, but not limited to:

(1) inspection checklists, reports, and correspondence;

(2) a log of all operation and maintenance activities undertaken;

(3) a gate operation plan, if applicable;

(4) a log of all repairs undertaken, including the date of the repairs and the work performed;

(5) a log of instrumentation readings, if applicable;

(6) a log of all flood events and emergencies; and

(7) approved plans, record drawings, specifications, approval letters, construction records, and other engineering and design reports.

(b) Owners shall maintain legible or electronic copies in a secure location, designated by the owner, that is immediately accessible to the owner for the life of the dam.

(c) Owners shall provide copies of all records or access to view the records to the executive director upon request.

(d) An owner shall provide all records to a new owner when there is an ownership change.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER E. REMOVAL OR BREACH OF DAMS

30 TAC §299.51, §299.52

STATUTORY AUTHORITY

These new sections are proposed under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These proposed new sections implement TWC, §§5.103, 5.105, and 12.052.

§299.51. Removal or Breach of Dams.

(a) Owners proposing to remove or breach a dam, or owners ordered to remove a deficient dam by the executive director, the commission, or court action, shall submit final plans and specifications to the executive director for review and approval before start of work to remove or breach the dam.

(b) The owner shall have a professional engineer submit to the executive director sealed, signed, and dated plans for removing or breaching a dam as outlined in the most current version, at the time of the design, of the agency's *Dam Removal Guidelines*.

(c) The owner may be required to address environmental or social impacts as described in the most current version, at the time of the design, of the agency's *Dam Removal Guidelines*, which may require approval from other agencies before construction can begin.

(d) The owner may be required to restore the property to the condition of the site before the dam was constructed.

(e) If the plans for removal or breaching meet the requirements in subsection (b) of this section, the executive director shall issue written approval to the owner.

(f) The owner shall provide the executive director within 45 days after completion of the breach or removal a notification of completion. The executive director shall conduct an inspection after receipt of notification of completion to verify that the removal or breach has been completed in agreement with the plans.

§299.52. Abandonment of Dams.

If an owner abandons a dam at any time, the owner shall remove or breach the dam, as described in §299.51 of this title (relating to Removal or Breach of Dams), at the owner's expense, to eliminate any hazard to life and property downstream.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER F. EMERGENCY MANAGEMENT

30 TAC §299.61, §299.62

STATUTORY AUTHORITY

These new sections are proposed under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These proposed new sections implement TWC, §§5.103, 5.105, and 12.052.

§299.61. Emergency Action Plans.

(a) The owners of all high- and significant-hazard dams, as defined in §299.13 of this title (relating to Size Classification Criteria) and §299.14 of this title (relating to Hazard Classification Criteria), shall prepare an emergency action plan to be followed by the owner in the event or threat of a dam emergency.

(b) The owner of an existing high- or significant-hazard dam shall submit the emergency action plan to the executive director for review within two years after the effective date of the rules.

(c) The owner of a proposed high- or significant-hazard dam shall submit the emergency action plan to the executive director before either requesting closure of the dam or upon completion of construction of the dam, if the dam does not require a closure section.

(d) The owner shall prepare the emergency action plan using guidelines provided by the executive director or using a format approved by the executive director before the plan is prepared. If an owner owns more than one dam, the owner shall prepare a plan, with timelines, for preparing emergency action plans based on priority determined by hazard and submit the plan to the executive director for review.

(e) The executive director shall review the emergency action plan and provide any comments in writing to the owner.

(f) The executive director shall file the emergency action plan in the agency's confidential, permanent records.

(g) The owner shall review the emergency action plan annually, update the emergency action plan as necessary, and submit a copy of the updated portions of the emergency action plan to the executive director annually beginning three years after the effective date of this section. If the emergency action plan was reviewed by the owner and no updates were necessary, the owner shall submit written notification to the executive director that no updates to the emergency action plan have been adopted or implemented.

(h) The owner shall perform a table top exercise of the emergency action plan on the frequency provided in the owner's emergency action plan, or at least every five years, with emergency management personnel in areas downstream of the dam.

§299.62. Security of Dams.

(a) Owners of high-hazard dams that are notified in writing by the executive director within six months of the effective date of these rules of dams that may need increased security shall address:

(1) security at the owner's dams to prevent unauthorized operation or access; and

(2) backup power requirements to ensure operation of the dam and appurtenant structures.

(b) The owner shall develop a security plan for the dam within two years of being notified by the executive director and shall submit the security plan to the executive director for review and comment.

(c) The executive director shall file the security plan in the agency's confidential, permanent files.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER G. ENFORCEMENT

30 TAC §299.71, §299.72

STATUTORY AUTHORITY

These new sections are proposed under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These proposed new sections implement TWC, §§5.103, 5.105, and 12.052.

§299.71. Enforcement.

(a) If the executive director alleges violations of this chapter, enforcement action may be pursued according to Texas Water Code, Chapter 7 and §70.5 of this title (relating to Remedies). Remedies include:

(1) seeking an emergency order from the commission to either reconstruct, modify, alter, or repair the deficient dam or remove the dam as described in §299.72 of this title (relating to Emergency Orders); or

(2) referring to the Office of the Attorney General for civil judicial action, including the assessment of civil penalties and injunctive relief.

(b) An owner who willfully fails or refuses to take appropriate action within the time frames addressed in the appropriate executive director enforcement letters is liable for a penalty of not more than $5,000 a day for each day the violation continues.

§299.72. Emergency Orders.

According to the provisions of Texas Water Code, §12.052, and Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions), the commission may issue emergency orders, without notice to the owner, directing the owner of a deficient dam to take immediate and appropriate action to remedy situations posing a threat to human life or property.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 25. BEACH CLEANING AND MAINTENANCE ASSISTANCE PROGRAM

31 TAC §25.13

The General Land Office (GLO) proposes amendments to §25.13 relating to extent of state assistance available to cities and counties as reimbursement for cleaning and maintenance of public beach. An amendment to §25.13(a) provides that cities and counties that qualify for eligibility under Texas Natural Resources Code §§61.068 - 61.070 may receive up to two-thirds reimbursement for eligible expenses to clean and maintain public beaches owned or managed by the Texas Parks and Wildlife Department (TPWD) where the city or county has provided a copy of the department's written authorization to perform such cleaning and maintenance. An amendment to §25.13(b) provides that cities that qualify for eligibility under Texas Natural Resources Code §61.080 and counties that qualify for reimbursement under Texas Natural Resources Code §61.081, but do not qualify for eligibility under Natural Resources Code §§61.068 - 61.070, may receive up to 40% reimbursement for eligible expenses to clean and maintain public beaches owned or managed by the TPWD where the city or county has provided a copy of the department's written authorization to perform such cleaning and maintenance. An amendment to §25.13(c) corrects a reference to the Natural Resources Code.

BACKGROUND AND ANALYSIS OF PROPOSED RULES

The purpose of the amendments to §25.13 is to allow cities and counties to receive reimbursement for eligible expenses incurred in performing beach cleaning and maintenance on public beaches that are owned or managed by the TPWD that are within the boundaries of the city or county. The current §25.13 allows reimbursement to a local government for the cleaning and maintenance of public beaches that are not in the jurisdiction of another governmental entity. The duty and responsibility of cities and counties bordering on the Gulf of Mexico to clean and maintain public beaches are mutually exclusive under the provisions of Texas Natural Resources Code §61.065 and §61.066. In contrast, the responsibility to clean and maintain beaches within state parks is not exclusive to the state. Texas Natural Resources Code §61.067 authorizes the GLO to adopt rules and procedures for cleaning beaches in state parks in consultation with TPWD. Section 61.067 does not prohibit reimbursement of a local government for cleaning beaches on property owned or managed by TPWD. Amendments are proposed to §25.13 to allow reimbursement to the local government where the beach maintenance is authorized by the TPWD.

FISCAL AND EMPLOYMENT IMPACTS

Jodena Henneke, Deputy Commissioner of Coastal Resources, has determined that for each year that the amended §25.13 are in effect, there will be no fiscal implications to state government. The Beach Maintenance Fund is a legislative appropriation from the general revenues of the State of Texas. Therefore, the amount of funds expended by the state for purposes of the Beach Maintenance Fund Reimbursement Program are limited to the appropriated amount. The fund, less 10% for administrative purposes, is disbursed to cities and counties in a fair and impartial manner under the procedures and accounting methods adopted in §25.4 and §25.15.

When the amendments to §25.13 go into effect, there could be a fiscal impact on all Beach Maintenance Fund Reimbursement Program participants if a single local government receives authorization from TPWD to maintain beaches inside an area owned or managed by the department. Pursuant to §25.4, relating to the Allocation of Available Funds, the Land Office allocates twenty-five percent of the funds available for distribution by determining each participant's proportionate share of total linear footage of gulf beach in relation to the footage of gulf beaches cleaned and maintained by all participants. Thus, should the linear footage of beach maintained by a single local government expand to encompass beaches inside an area owned or managed by the department, the proportionate share of total gulf beach cleaned by each participant would change thereby affecting all disbursements.

Ms. Henneke also determined that there will be no additional costs of compliance for large and small businesses or individuals resulting from the proposed amendments. The amendments only affect reimbursements to local governments for eligible expenses.

The GLO has determined that a local employment impact statement on these proposed regulations is not required because the proposed regulations will not adversely affect any local economy in a material manner for the first five years that the rule change will be in effect.

PUBLIC BENEFIT

Ms. Henneke also determined that every year for the first five-year period the proposed amendments are in effect, that the public will benefit from the proposed changes because cleaning and maintenance activities initiated by local governments in public beaches owned or managed by the TPWD will reduce conditions that pose a risk to the safety and personal health of beach visitors. Furthermore, the collection and removal of litter and debris can result in increased tourism thereby providing local businesses and government with the potential to boost tourism revenues.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. A "major environmental rule" is a rule specifically intended to protect the environment or reduce the risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The GLO has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT REQUEST

To comment on the proposed rulemaking, please send a written comment to Mr. Walter Talley, Texas Register, Liaison, Texas General Land Office, P.O. Box 12873, Austin, TX 78711, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Written comments must be received no later than 5:00 p.m., thirty (30) days from the date of publication of this proposal.

STATUTORY AUTHORITY

The amendments are proposed under Texas Natural Resources Code §61.067, which authorizes the GLO to adopt rules for cleaning beaches in state parks and rules reasonably necessary to perform its duties under Texas Natural Resources Code Chapter 61, Subchapter C, pertaining to maintenance of public beaches.

Texas Natural Resources Code §§61.068 - 61.070 are affected by the proposed amendments.

§25.13. Extent of State Assistance.

(a) Cities and counties that [~~which~~] qualify for eligibility under the Natural Resources Code, §§61.068 - 61.070, may receive up to, but no greater than two-thirds reimbursement for eligible expenses incurred in cleaning and maintaining public beaches within such cities and counties that [~~which~~] are not under the jurisdiction of another governmental entity. However, cities and counties may receive reimbursement under this subsection for eligible expenses to clean and maintain public beaches within an area owned or managed by the Texas Parks and Wildlife Department (department) if the department authorizes the applicant to maintain the public beaches within the area owned or managed by the department. The applicant must submit documentation of such authorization to the land office. Reimbursement under this subsection is limited to public beaches lying within the boundaries of such cities and counties.

(b) Cities qualifying for eligibility under the Natural Resources Code, §61.080, or counties qualifying for eligibility under the Natural Resources Code, §61.081, and which do not qualify for eligibility under the Natural Resources Code, §§61.068 - 61.070, may receive up to 40% reimbursement for eligible expenses incurred in cleaning and maintaining public beaches within their boundaries, but not under the jurisdiction of another governmental entity. However, cities and counties may receive reimbursement under this subsection for eligible expenses to clean and maintain public beaches within an area owned or managed by the department if the department authorizes the applicant to maintain the public beaches within the area owned or managed by the department. The applicant must submit documentation of such authorization to the land office. Reimbursement under this subsection is limited to public beaches lying within the boundaries of such cities and counties.

(c) Monies received by an eligible coastal municipality under the Tax Code, §156.2511, shall be included as part of the state share as required by the Texas Natural Resources Code, §61.076(c)(2), and must be spent on cleaning and maintaining the beach as required by the Tax Code, §156.2511(b); however, these funds are not eligible for reimbursement from the BMFP program as specifically prohibited by the Texas Natural Resources [~~Resource~~] Code, §61.076(c)(1).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 14, 2008.

TRD-200803589
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Earliest possible date of adoption: August 24, 2008
For further information, please call: (512) 475-1859

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER V. FRANCHISE TAX

34 TAC §3.597

The Comptroller of Public Accounts proposes new §3.597, concerning margin: Business Tax Advisory Committee. This section implements House Bill 3928, 80th Legislature, 2007, which revises the franchise tax. This section establishes procedures for the functions of the Business Tax Advisory Committee under Tax Code, Chapter 171. Subsection (a) provides that this section only applies to franchise tax reports due on or after January 1, 2008. Subsection (b) dictates the membership of the committee. Subsection (c) defines the purpose of the committee. Subsection (d) establishes procedures for the functions of the advisory committee. Subsection (e) lists the expiration date of this section.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the proposed new rule would benefit the public by providing guidance to the Business Tax Advisory Committee, which is tasked by the legislature to report on the revised franchise tax's effects on the businesses in Texas. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This new section is proposed under Tax Code, §111.002 and §111.022, which provides the comptroller with the authority to prescribe, adopt and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new section implements Tax Code, §171.214.

§3.597. Margin: Business Tax Advisory Committee.

(a) Effective date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008.

(b) Membership. The Business Tax Advisory Committee is composed of:

(1) the comptroller, who is the presiding officer of the advisory committee;

(2) two members of the house of representatives, appointed by the speaker of the house of representatives;

(3) two members of the senate, appointed by the lieutenant governor; and

(4) the following persons appointed by the comptroller, who shall determine the number of residents appointed:

(A) at least five residents of this state who are engaged in a private business, as either an employee or an owner, that is subject to taxation under this chapter; and

(B) at least two residents of this state with expertise in state business taxation.

(c) Purpose. The advisory committee shall conduct a biennial study of the effects of the tax imposed under this chapter on businesses in this state. The study must take into consideration:

(1) the relative share of the tax paid by industry and by size of business;

(2) how the incidence of the tax compares with the economic makeup of this state's business economy;

(3) how the tax compares in structure and in amounts paid to the business taxes imposed by other states;

(4) the effect of the tax on the economic climate of this state, including the effect on capital investment and job creation;

(5) any factors that result in the tax not operating as intended; and

(6) any other item presented by the comptroller or by a majority of the committee.

(d) Procedures. Report findings are to be issued to the speaker of the house of representatives, the lieutenant governor, and the governor not later than the date each regular session of the legislature begins.

(e) Expiration. This section expires January 31, 2013.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 10, 2008.

TRD-200803541
Martin Cherry
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: August 24, 2008
For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 81. INTERACTION WITH THE PUBLIC

37 TAC §81.81

The Texas Youth Commission proposes new §81.81, concerning Background Checks. The new section will require initial and annual background checks for employees, volunteers, contractors, advocates, ombudsmen, and certain other persons who deliver services to TYC youth or have access to youth records.

Robin McKeever, Chief Financial Officer, has determined that for the first five-year period the new section is in effect, there will be no significant fiscal impact for state or local government as a result of enforcing or administering the new section.

Leticia Peña-Martinez, Deputy Commissioner for Policy and Planning, has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be increased protection of TYC youth and youth records due to a more comprehensive system of background checks for any person having contact with youth or access to youth records. There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the new section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to DeAnna Lloyd, Manager of Policy and Accreditation, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The new section is proposed under the Human Resources Code, §61.0357, which requires the commission to conduct national and state criminal history checks and review the employment history for certain persons who work in commission facilities or work with youth or youth records.

The proposed rule affects the Human Resources Code, §61.034.

§81.81. Background Checks.

(a) Policy. The Texas Youth Commission (TYC) reviews criminal histories and employment references for certain persons as required under §61.0357, Texas Human Resources Code.

(b) Applicability. This rule does not apply to:

(1) youth access to a personal attorney, minister, pastor, or religious counselor under §93.11 or §93.17 of this title (relating to Access to Attorneys and Courts and Access to Personal Minister, Pastor, or Religious Counselor);

(2) youth access to visitors under §93.12 of this title (relating to Visitation); or

(3) special event visitors, as defined in this rule.

(c) Definitions. The following terms, as used in this rule, have the following meanings unless the context clearly indicates otherwise:

(1) Advocate--means a person who is employed by or otherwise officially associated with an organization registered with TYC as an advocacy or support group under §81.83 of this title (relating to Advocacy and Support Group Access).

(2) Background Check--consists, at a minimum, of the following:

(A) Criminal History Check--includes national and state criminal history information maintained by the Department of Public Safety; and

(B) Employment Reference Check--includes references from previous and current employers.

(3) Contractor--means a person who is under contract with TYC individually or is an employee or subcontractor of an organization under contract with TYC.

(4) Covered Person--means:

(A) an employee, volunteer, ombudsman, advocate, or contractor, as defined in this rule;

(B) any person not described in paragraph (4)(A) of this subsection who provides direct delivery of services to youth whose current assignment is to a residential placement operated by or under contract with TYC when those services are provided at the request of TYC;

(C) any person not described in paragraph (4)(A) of this subsection who is authorized to have unsupervised access to records of identifiable TYC youth; or

(D) any person who is an applicant for a position described in paragraphs (4)(A) - (C) of this subsection.

(5) Employee--means a person who is employed by TYC.

(6) Ombudsman--means a person who is employed by the Office of Independent Ombudsman of the Texas Youth Commission.

(7) Special Event Visitor--means a person who:

(A) is invited by TYC to participate in a special event for the benefit of youth;

(B) does not participate in more than four special events in any 12-month period;

(C) does not provide direct delivery of services to youth;

(D) does not have access to youth records; and

(E) does not meet the definition of advocate, contractor, employee, or ombudsman.

(8) Volunteer--means a person who is registered in a position that renders services for or on behalf of TYC that does not receive compensation in excess of reimbursement for expenses incurred. For purposes of this rule, "volunteer" does not include special event visitors.

(d) General Provisions.

(1) Except as described in paragraph (2) of this subsection, TYC's chief executive officer or his/her designee will:

(A) conduct a background check on each covered person prior to granting the person access to any residential facility operated by or under contract with TYC, youth, or youth records; and

(B) conduct a criminal history check on each covered person at least once per year thereafter.

(2) The TYC chief executive officer or designee may elect to waive the background check:

(A) for a contractor when physical or procedural barriers are in place to prevent the contractor from having contact with or access to TYC youth and the scope of services to be performed does not involve access to youth records;

(B) for a contractor who has an independent legal obligation to protect the confidentiality of youth records and the scope of services to be performed does not involve access to youth;

(C) for a covered person who provides direct delivery of off-site services to youth assigned to residential placements when

the person is required to submit to a background check as a condition of professional licensure or employment (e.g., health care specialist referrals); or

(D) for a covered person providing necessary services in an emergency situation when no appropriately screened service providers offering the same or similar service are immediately available and a delay in providing the service would risk significant harm to a youth (e.g., emergency room visits or rape crisis counseling); or

(E) for a covered person providing services in his/her official capacity as an employee of a federal, state, or local governmental entity.

(3) TYC does not assess a fee in connection with the administrative costs incurred in conducting a background check as described in this rule.

(4) As part of the initial national criminal history background check, a covered person must electronically provide a complete set of fingerprints to TYC.

(5) A covered person must provide employment history information in a form and manner determined by TYC.

(6) All criminal history information obtained from the National Crime Information Center (NCIC) or any other state crime information database is confidential and not releasable.

(e) Standards for Evaluating Background Information.

(1) Background check results for covered persons will be evaluated according to standards established in TYC's policies addressing eligibility for employment or assignment in effect at the time the background check is conducted.

(2) When a background check reveals a criminal or employment history that is deemed unacceptable for the position or service to be performed by an employee or volunteer, TYC will deny or terminate employment or enrollment.

(3) When a background check reveals a criminal or employment history that is deemed unacceptable for the position or service to be performed by a contractor, advocate, or ombudsman, TYC will deny the person access to youth, youth information, TYC facilities, or any or all of the preceding. TYC will provide written notice to a contractor, advocate, or ombudsman whose access is denied.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 14, 2008.

TRD-200803579
Richard Nedelkoff
TYC Conservator
Texas Youth Commission
Earliest possible date of adoption: August 24, 2008
For further information, please call: (512) 424-6475

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37 TAC §81.83

The Texas Youth Commission proposes new §81.83, concerning Advocacy and Support Group Access. The new section will establish a system for registering advocacy and support group members who wish to provide on-site information, support, or other services to youth confined in commission facilities.

Robin McKeever, Chief Financial Officer, has determined that there is insufficient data to accurately determine the fiscal implications of enforcing the rule. The anticipated cost for each additional fingerprint-based background check that TYC is required to conduct under this section is approximately $10. The total number of additional fingerprint-based background checks required during the first five-year period the section is in effect is unknown.

Tracy Levins, Director of Administrative Services and Community Relations, has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the establishment of an organized system to increase youth access to beneficial services provided by community partners. There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the new section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to DeAnna Lloyd, Manager of Policy and Accreditation, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The new section is proposed under the Human Resources Code, §61.0386, which provides the commission with the authority to adopt security and privacy procedures for groups that provide on-site information, support, and other services to youth confined in commission facilities.

The proposed rule affects the Human Resources Code, §61.034.

§81.83. Advocacy and Support Group Access.

(a) Policy. The Texas Youth Commission (TYC) allows advocacy and support groups to provide on-site information, support, and other services for youth confined in TYC facilities.

(b) Applicability. This rule does not apply to youth access to a personal attorney, minister, pastor, or religious counselor. See §93.11 of this title (relating to Attorneys and Courts) and §93.17 of this title (relating to Personal Minister, Pastor, or Religious Counselor).

(c) Definitions. The following words and terms, as used in this rule, have the following meanings, unless the context clearly indicates otherwise:

(1) Advocacy or Support Groups--means organizations whose primary functions are to benefit children, inmates, girls and women, persons with mental illness, or victims of sexual assault.

(2) Confined--means placement in a residential facility.

(3) Confidential setting--means a setting that provides for private conversation but is within the line of sight of a TYC staff member who is authorized to provide sole supervision of youth.

(d) Registration Procedures.

(1) An advocacy or support group must register with TYC prior to providing on-site information, support, or other services to confined youth.

(2) In order to register with TYC, an advocacy or support group must provide the following in a form and manner determined by TYC:

(A) copy of articles of incorporation on file with the secretary of state or other official documentation showing the organization's primary purpose;

(B) contact information for local program director(s);

(C) names of all persons employed by or otherwise officially representing the group who would likely seek access to residential facilities under the provisions of this rule; and

(D) if 24-hour access to residential facilities is believed to be necessary to perform the group's primary function, a written justification of the need for such access and the names of individuals representing the group who perform the function for which 24-hour access is requested.

(3) The TYC division director with responsibility over volunteer services or his/her designee will determine whether or not an organization qualifies as an advocacy or support group as defined in this rule, and whether or not 24-hour access, if requested, is necessary to provide the group's primary function.

(4) A determination that an organization does not qualify as an advocacy or support group under this rule, or that a request for 24-hour access has been denied, must be in writing and may be appealed to the TYC chief executive officer or his/her designee. The appeal must be in writing and clearly state the reason the organization should be considered an advocacy or support group under this rule or the reason that denial of 24-hour access would prevent the group from effectively performing its primary function.

(5) A person representing a registered advocacy or support group will not be permitted to provide information, support, or other services to youth in a confidential setting unless and until:

(A) TYC conducts a background check pursuant to §81.81 of this title (relating to Background Checks) and clears the person for such access; and

(B) the person signs appropriate confidentiality agreements concerning youth information and/or records.

(6) A registered advocacy or support group must provide immediate written notification to TYC when a person who is registered with TYC as a representative of the group ceases to represent the group.

(e) General Provisions.

(1) A person who has been granted 24-hour access should provide reasonable advance notice of his/her intention to visit a facility to allow for security and confidentiality arrangements to be made. Lack of advance notice does not constitute grounds for denying entry.

(2) A person who has not been granted 24-hour access may access residential facilities during youth waking hours, and must provide notice at least 24 hours in advance of his/her intention to visit a facility in order for security and confidentiality arrangements to be made. Visits with less than 24-hour advance notice will be accommodated when possible.

(3) The security and confidentiality measures arranged by TYC must not be designed to deny a registered advocacy or support group access to youth.

(4) A person who has been cleared for access and who has provided adequate advance notice, if required, will not be denied access to any residential facility unless, in the judgment of the facility administrator or designee, the circumstances existing at the time of the visit create an unacceptable risk to the safety of youth, staff, or visitors. If, upon arrival at a facility, a representative of an advocacy or support group is denied entry due to unsafe conditions, the facility administrator or designee must provide written justification to the organization within three business days. A youth's current placement in a security unit does not, absent additional factors, constitute an unacceptable safety risk which would prevent access by a registered advocate.

(5) A person who has been cleared for access must present picture identification at the entry point in order to gain access to the facility.

(6) Pursuant to §97.10 of this title (relating to Entry Searches), members of advocacy and support groups are subject to search upon entry to a secure residential facility.

(7) Any registered member of advocacy and support groups who has cause to believe that a youth has been or may be adversely affected by abuse, neglect, or exploitation has a legal obligation to report the matter. The reporting requirement applies without exception to a person whose personal communications may otherwise be privileged. See §93.33 of this title (relating to Alleged Abuse, Neglect, and Exploitation) for more information on reports and investigations of suspected abuse, neglect, or exploitation.

(8) Youth have the right to refuse a visit with an advocate.

(9) Under §81.11 of this title (relating to Complaints from the Public), advocacy and support groups may file complaints regarding the security and privacy procedures arranged by a facility.

(10) Provisions of this rule may not be used to bypass the provisions of §93.12 of this title regarding visitation procedures for family members of TYC youth.

(f) Revocation of Access.

(1) TYC may revoke the access of a representative of a registered advocacy or support group, with written notice, when the person has endangered the safety of youth or security of the facility, or when the person has violated a TYC confidentiality agreement.

(2) Revocation of access may be appealed to TYC's chief executive officer or his/her designee. The appeal must be in writing and clearly state the reason the person's access should not be revoked.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 14, 2008.

TRD-200803580
Richard Nedelkoff
TYC Conservator
Texas Youth Commission
Earliest possible date of adoption: August 24, 2008
For further information, please call: (512) 424-6475

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CHAPTER 85. ADMISSION, PLACEMENT, AND PROGRAM COMPLETION
SUBCHAPTER A. COMMITMENT AND RECEPTION

37 TAC §85.1

The Texas Youth Commission (TYC) proposes an amendment to §85.1, concerning Legal Requirements for Admission. Senate Bill (SB) 103, enacted by the 80th Texas Legislature, requires committing courts to provide certain documents to TYC upon committing a youth to TYC. Section 85.1 will be amended to include any documents listed in SB 103 that are not already present in the rule.

Robin McKeever, Chief Financial Officer, has determined that for the first five-year period the new section is in effect, there will be no significant fiscal impact for state or local government as a result of enforcing or administering the new section.

Leticia Peña-Martinez, Deputy Commissioner for Policy and Planning, has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be compliance with recently enacted legislation. There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the new section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to DeAnna Lloyd, Manager of Policy and Accreditation, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The amendment is proposed under the Human Resources Code, §61.0651, which requires committing courts to provide certain documents upon commitment to the commission, and Family Code, §54.04(e), which requires TYC to accept a person properly committed to it by a juvenile court.

The proposed amendment affects the Human Resources Code, §61.034.

§85.1. Legal Requirements for Admission.

(a) [~~Purpose.~~] The purpose of this rule is to establish documentation required and requested by the Texas Youth Commission from each juvenile court committing youth to TYC.

(b) Each youth committed to the Texas Youth Commission (TYC) must be accompanied by legal and supporting documents supplied by the committing court.

(c) Upon admission, the following documents are required of the committing court:

(1) certified copy of the Order of Commitment;

(2) immunization records;

(3) Common Application, including the computerized referral and case history for the youth documenting case disposition, contact information for the youth's parents or guardians, the name, address, and telephone number of the court administrator in the committing county, and Title IV-E eligibility screening information; [~~CCF-002,~~]

(4) detention [~~Detention~~] order(s) (initial and subsequent) for offense(s) which resulted in commitment to TYC;

(5) for [~~For~~] sentenced offenders, the amount of time spent in detention in connection with the offense for which the youth was sentenced. It is preferable for the detention information to be included in the Order of Commitment;[~~.~~]

(6) petition, adjudication, and disposition orders for the youth, including the youth's thumbprint; [~~which prompted the commitment hearing;~~]

(7) if the commitment is the result of revocation of probation, a copy of the conditions of probation and the revocation order;

[~~(7) the judgment which followed adjudication;~~]

(8) any law enforcement incident reports concerning the offense for which the youth is committed;

[~~(8) Texas Department of Public Safety Sex Offender Registration as required by law;~~]

(9) any sex offender registration documentation and information;

(10) [~~(9)~~] birth certificate for all youth;

(11) social security number or social security card, if available;

(12) [~~(10)~~] social history;

(13) [~~(11)~~] education records;

(14) [~~(12)~~] medical and dental records;

(15) [~~(13)~~] any existing psychological and psychiatric reports;

(16) [~~(14)~~] pretrial detention time creditable to the youth's sentence; [~~and~~]

(17) [~~(15)~~] progressive sanctions deviation worksheet if assigned progressive sanctions level does not equal the progressive sanctions guideline level; and[~~.~~]

(18) [~~(16)~~] when available, the Victim Impact Statement and/or Victim Information form.

(d) The TYC intake staff shall review the commitment order [~~document~~] to determine if, on its face, it meets all requirements of a valid court order before TYC admits [~~receives~~] the youth. TYC will not look beyond the document itself for determining its validity. [~~Questions regarding verification of validity should be directed to the legal services department.~~]

(e) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 14, 2008.

TRD-200803581
Richard Nedelkoff
TYC Conservator
Texas Youth Commission
Earliest possible date of adoption: August 24, 2008
For further information, please call: (512) 424-6475

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CHAPTER 105. JUVENILE CORRECTIONAL OFFICERS

37 TAC §105.1

The Texas Youth Commission proposes new §105.1, concerning Juvenile Correctional Officer Training. The new section will comply with provisions enacted during the last legislative session by requiring each Juvenile Correctional Officer (JCO) to receive 300 hours of training prior to independently commencing supervisory duties.

Robin McKeever, Chief Financial Officer, has determined that for the first five-year period the new section is in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the new section.

Marty Martin, Director of Training, has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be agency compliance with provisions enacted by the 80th Legislature, as

well as enhanced JCO job performance due to the additional training. There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the new section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to DeAnna Lloyd, Manager of Policy, Grants, and Accreditation, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The new section is proposed under the Human Resources Code, §61.0356, which provides the commission with the responsibility to ensure each juvenile correctional officer employed by the commission receives at least 300 hours of training prior to independently commencing his or her duties.

The proposed rule affects the Human Resources Code, §61.034.

§105.1. Juvenile Correctional Officer Training.

(a) Policy. Pursuant to Texas Human Resources Code §61.0356, juvenile correctional officers (JCOs) employed by the Texas Youth Commission (TYC) must complete at least 300 hours of training prior to assuming responsibility for sole supervision of youth.

(b) Applicability. This rule applies to JCOs employed by the TYC on a full or part time basis.

(c) Definitions. Sole Supervision--means a person is qualified to independently perform youth supervision duties.

(d) Procedures.

(1) Training required for JCO staff prior to assuming sole supervision responsibility consists of at least 300 hours of category-specific modules delivered through:

(A) local training at the facility by agency training staff or adjunct trainers;

(B) pre-service training at TYC's pre-service academy or another designated location; and

(C) training at the JCO's duty location, which includes on-the-job training.

(2) Training for JCO staff will include, but is not limited to, modules that provide information and instruction in the following categories:

(A) the juvenile justice system of Texas, including the juvenile correctional facility system;

(B) security procedures;

(C) the supervision of children committed to the TYC;

(D) signs of suicide risks and suicide precautions;

(E) signs and symptoms of the abuse, assault, neglect, and exploitation of a child, including sexual abuse and sexual assault, and the manner in which to report the abuse, assault, neglect, or exploitation of a child;

(F) the neurological, physical, and psychological development of adolescents;

(G) TYC rules and regulations, including rules, regulations, and tactics concerning the use of force;

(H) appropriate restraint techniques;

(I) the Prison Rape Elimination Act of 2003 (42 U.S.C. Section 15601, et seq.);

(J) the rights and responsibilities of children in the custody of the TYC;

(K) interpersonal relationship skills;

(L) the social and cultural lifestyles of children in the custody of the TYC;

(M) first aid and cardiopulmonary resuscitation;

(N) counseling techniques;

(O) conflict resolution and dispute mediation, including de-escalation techniques;

(P) behavior management;

(Q) mental health issues;

(R) employee rights, employment discrimination, and sexual harassment.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 14, 2008.

TRD-200803582
Richard Nedelkoff
TYC Conservator
Texas Youth Commission
Earliest possible date of adoption: August 24, 2008
For further information, please call: (512) 424-6475

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PART 7. TEXAS COMMISSION ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUCATION

CHAPTER 211. ADMINISTRATION

37 TAC §211.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §211.1 concerning Definitions. Amendments to subsection (a) include: adding definitions for commercial training contractor, personal identification number (PID), separation, and TCLEDDS; modifying definitions for ALJ or Administrative law judge, contractual training provider, convicted, killed in the line of duty, proprietary training contractor, reactivate, and reserve; and deleting definitions for hearings examiner, resigned/terminated, and Texas peace officer. Amendments to this rule make it necessary to renumber subsection (a). Subsection (b) is amended to reflect the effective date of these changes.

These changes are necessary in order to allow for more clarity.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no fiscal impact to state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by ensuring that all rules re-

ferring to these terms will be more easily understood, allowing for law enforcement professionals to make better-informed decisions when addressing commission issues

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small businesses or individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 U.S. 290 East, Austin, Texas 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed is in compliance with Texas Occupations Code, §1701.251, Training Programs; Instructors, §1701.312, Disqualification Felony Conviction or Placement on Community Supervision, §1701.316, Reactivation of Peace Officer License, §1701.452, Employment Termination Report, and Code of Criminal Procedure, Art. 55.04, Violation of Expunction Order.

No other code, article, or statute is affected by this proposal.

§211.1. Definitions.

(a) The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Academic provider--A school, accredited by the Southern Association of Colleges and Schools and the Texas Higher Education Coordinating Board, which has been approved by the commission to provide basic licensing courses.

(2) Academic alternative program--A program for college credit offered by a training provider recognized by the Southern Association of Colleges and Schools and the Higher Texas Education Board, authorized by the commission to conduct preparatory law enforcement training as part of a degree plan program, and consisting of commission-approved curricula.

(3) Accredited college or university--An institution of higher education that is accredited or authorized by the Southern Association of Colleges and Schools, the Middle States Association of Colleges and Schools, the New England Association of Schools and Colleges, the North Central Association of Colleges and Schools, the Northwest Commission on Colleges and Universities, or the Western Association of Schools and Colleges.

(4) Active--A license issued by the commission that meets the current requirements of licensure and training as determined by the Commission.

(5) Agency--A law enforcement unit or other entity, whether public or private, authorized by Texas law to appoint a person licensed or certified by the commission.

(6) Administrative Law Judge (ALJ)--An administrative law judge appointed by the chief administrative law judge of the State Office of Administrative Hearings.

~~[(6) ALJ or Administrative law judge--See "Hearings Examiner" defined below.]~~

(7) Alternative delivery--A learning event characterized by a separation of place or time between the instructor and student, the students, and/or the student and learning resources; and in which the interaction between these is conducted through one or more media.

(8) Appointed--Elected or commissioned by an agency as a peace officer, reserve or otherwise selected or assigned to a position governed by the Occupations Code, Chapter 1701, without regard to pay or employment status.

(9) Background investigation--A pre-employment background investigation that is designed to satisfy:

(A) that an applicant is in compliance with all minimum standards for employment, and

(B) that an applicant is screened out, who, based on their past history or other relevant information, is found to be unsuitable for the position in question.

(C) The background investigation consists of a report that documents, but is not limited to the following:

(i) A review of all previous law enforcement employment, including contacting all former law enforcement employers,

(ii) an investigation looking specifically at a person's dependability; integrity; initiative; situational reasoning ability; self-control; writing skills; reading skills; oral communications skills; interpersonal skills; and physical ability; and

(iii) a report that documents an investigation into an applicant's suitability for licensing and appointment which includes: biographical data; scholastic data; employment data; criminal history data; interviews with references, supervisors, and other people who have knowledge of the person's abilities, skills, and character; and a summary of the investigator's findings and conclusions regarding the applicant's moral character and suitability.

(10) Basic licensing course--Any current commission developed course that is required before an individual may be licensed by the commission.

(11) Basic peace officer course--The current commission developed course(s) required for licensing as a peace officer, taught at a licensed law enforcement academy in accordance with commission requirements.

(12) Certified copy--A true and correct copy of a document or record certified by the custodian of records of the submitting entity.

(13) Chief administrator--The head or designee of a law enforcement agency.

(14) Commercial training contractor--An approved training contractor operating for profit and offering courses based on commission-developed learning objectives.

(15) [~~(14)~~] Commission--The Texas Commission on Law Enforcement Officer Standards and Education.

(16) [~~(15)~~] Commissioned--Has been given the legal power to act as a peace officer or reserve, whether elected, employed, or appointed.

(17) [~~(16)~~] Commissioners--The nine commission members appointed by the governor and, where appropriate, the five ex-officio members.

(18) [~~(17)~~] Contract jail--A correctional facility, operated by a county, municipality or private vendor, operating under a contract with a county or municipality, to house inmates convicted of offenses committed against the laws of another state of the United States, as provided by Texas Government Code, §511.0092.

(19) [~~(18)~~] Contractual training provider--A law enforcement agency, a law enforcement association, [~~or~~] alternative delivery trainer, proprietary training contractor, or commercial training contractor that conducts specific education and training under a contract with the commission.

(20) [~~(19)~~] Convicted--Has been adjudged guilty of or has had a judgment of guilt entered in a criminal case that has not been set aside on appeal, regardless of whether:

(A) the sentence is subsequently probated and the person is discharged from probation;

(B) the charging instrument is dismissed and the person is released from all penalties and disabilities resulting from the offense; or

[~~(C) the cause has been made the subject of an expunction order; or~~]

(C) [~~(D)~~] the person is pardoned, unless the pardon is expressly granted for subsequent proof of innocence.

(21) [~~(20)~~] Court-ordered community supervision--Any court-ordered community supervision or probation resulting from a deferred adjudication or conviction by a court of competent jurisdiction. However, this does not include supervision resulting from a pretrial diversion.

(22) [~~(21)~~] Distance education--The enrollment and study with an educational institution, which provides lesson materials prepared in a sequential and logical order for study by students on their own.

(23) [~~(22)~~] Duty ammunition--Ammunition required or permitted by the agency to be carried on duty.

(24) [~~(23)~~] Endorsement--An official document stating that an individual has met the minimum training standards appropriate to the type of examination sought as determined by the Commission.

(25) [~~(24)~~] Executive director--The executive director of the commission or any individual authorized to act on behalf of the executive director.

(26) [~~(25)~~] Experience--Includes each month, or part thereof, served as a peace officer, reserve, jailer, telecommunicator, or federal officer. Credit may, at the discretion of the executive director, be awarded for relevant experience from an out-of-state agency.

(27) [~~(26)~~] Firearms--Any handgun, shotgun, precision rifle, patrol rifle, or fully automatic weapon that is carried by the individual officer in an official capacity.

(28) [~~(27)~~] Firearms proficiency--Successful completion of the annual firearms proficiency requirements.

(29) [~~(28)~~] Field training program--A program intended to facilitate a transition from the academic setting to the performance of the general duties of the appointing agency.

(30) [~~(29)~~] Governing body resolution--A formal expression or action by a governing body authorizing a particular act, transaction, appointment, intention, or decision.

[~~(30) Hearings examiner--An administrative law judge appointed by the chief administrative law judge of the State Office of Administrative Hearings pursuant to the Texas Government Code, Ch. 2003, or a person appointed by the executive director to conduct administrative hearings for the commission.~~]

(31) High school diploma--High school diploma is a document issued by a school district or a school accredited by the Texas Private School Accreditation Commission verifying that the recipient has successfully completed the course of study prescribed by the school district and accepted by the Texas Education Agency.

(32) Individual--A human being who has been born and is or was alive.

(33) Jailer--A person employed or appointed as a jailer under the provisions of the Local Government Code, §85.005, or Government Code §511.0092.

(34) Killed in the line of duty--A death that is the [~~Texas peace officer killed as a~~] directly attributed result of a personal injury sustained in the line of duty.

(35) Law--Including, but not limited to, the constitution or a statute of this state, or the United States; a written opinion of a court of record; a municipal ordinance; an order of a county commissioners' court; or a rule authorized by and lawfully adopted under a statute.

(36) Law enforcement academy--A school operated by a governmental entity that has been licensed by the commission, which may provide basic licensing courses and continuing education.

(37) Law enforcement automobile for training--A vehicle equipped to meet the requirements of an authorized emergency vehicle as identified by Transportation Code [~~Sees.~~] §546.003 and §547.702.

(38) Lesson plan--Detailed guides from which an instructor teaches. The plan includes the goals, specific content and subject matter, performance or learning objectives, references, resources, and method of evaluating or testing students.

(39) License--A license required by law or a state agency rule that must be obtained by an individual to engage in a particular business.

(40) Licensee--An individual holding a license issued by the commission.

(41) Line of duty--Any lawful and reasonable action, which a Texas peace officer is required or authorized by rule, condition of employment, or law to perform. The term includes an action by the individual at a social, ceremonial, athletic, or other function to which the individual is assigned by the individual's employer.

(42) Moral character--The propensity on the part of a person to serve the public of the state in a fair, honest, and open manner.

(43) Officer--A peace officer or reserve identified under the provisions of the Occupations Code, §1701.001.

(44) Patrol rifle--Any magazine-fed repeating rifle with iron/open sights or with a frame mounted optical enhancing sighting device, 3 power or less, that is carried by the individual officer in an official capacity.

(45) Peace officer--A person elected, employed, or appointed as a peace officer under the provisions of the Occupations Code, §1701.001. [~~under the Code of Criminal Procedure, Article 2.12, or under other statute.~~]

(46) Personal Identification Number (PID)--A unique computer-generated number assigned to individuals for identification in the commission's electronic database.

(47) [~~(46)~~] Placed on probation--Has received an adjudicated, unadjudicated or deferred adjudication probation for a criminal offense.

(48) [~~(47)~~] POST--State or federal agency with jurisdiction similar to that of the commission, such as a peace officer standards and training agency.

(49) [~~(48)~~] Precision rifle--Any rifle with a frame mounted optical sighting device greater than 3 power that is carried by the individual officer in an official capacity.

(50) [~~(49)~~] Proprietary training contractor--An approved training contractor who has a proprietary interest in the intellectual property delivered. [~~operated for a profit.~~]

(51) [~~(50)~~] Public security officer--A person employed or appointed as an armed security officer by this state or a political subdivision of this state. The term does not include a security officer employed by a private security company that contracts with this state or a political subdivision of this state to provide security services for the entity.

(52) [~~(51)~~] Reactivate--To make a license issued by the commission active after at least a two-year break in service and the licensee's failure to complete legislatively required training.

[~~(52) Resigned/Terminated--an explanation of the circumstances under which the individual resigned (retired, honorably discharged), was terminated (dishonorably discharged, generally discharged), or other (killed in the line of duty, died, or disabled) in accordance with §1701.452.~~]

(53) Reinstate--To make a license issued by the commission active after disciplinary action or after expiration of a license due to failure to obtain required continuing education.

(54) Renew--Continuation of an active license issued by the commission.

(55) Reserve--A person appointed as a reserve law enforcement officer under the provisions of the Occupations Code, §1701.001. [~~Local Government Code, §85.004, §86.012, §341.012, or §60.0775.~~]

(56) Self-assessment--Completion of the commission created process, which gathers information about a training or education program.

(57) Separation--An explanation of the circumstances under which the person resigned, retired, or was terminated, reported on the form currently prescribed by the commission, in accordance with Occupations Code, §1701.452.

(58) [~~(57)~~] SOAH--The State Office of Administrative Hearings.

(59) [~~(58)~~] Successful completion--A minimum of:

(A) 70 percent or better; or

(B) C or better; or

(C) pass, if offered as pass/fail.

(60) TCLEDDS--Texas Commission on Law Enforcement Data Distribution System.

(61) [~~(59)~~] Telecommunicator--A dispatcher or other emergency communications specialist appointed under or governed by the provisions of the Occupations Code, Chapter 1701.

[~~(60) Texas peace officer--For the purposes of eligibility for the Texas Peace Officers' Memorial, an individual who had been elected, employed, or appointed as a peace officer under Texas law; an individual appointed under Texas law as a reserve peace officer, a commissioned deputy game warden, or a corrections officer in a municipal, county, or state penal institution, a federal law enforcement officer or special agent performing duties in this state, including those officers under Article 2.122, Code of Criminal Procedure, or any other officer authorized by Texas law.~~]

(62) [~~(61)~~] Training coordinator--An individual, appointed by a commission-recognized training provider, who meets the requirements of §215.9.

(63) [~~(62)~~] Training cycle--A 48-month period as established by the commission. Each training cycle is composed of two contiguous 24-month units.

(64) [~~(63)~~] Training hours--Classroom or distance education hours reported in one-hour increments.

(65) [~~(64)~~] Training program--An organized collection of various resources recognized by the commission for providing preparatory or continuing training. This program includes, but is not limited to, learning goals and objectives, academic activities and exercises, lesson plans, exams, skills training, skill assessments, instructional and learning tools, and training requirements.

(66) [~~(65)~~] Training provider--A governmental body, law enforcement association, alternative delivery trainer, or proprietary entity credentialed by the commission to provide preparatory or continuing training for licensees or potential licensees.

(67) [~~(66)~~] Verification (verified)--The confirmation of the correctness, truth, or authenticity of a document, report, or information by sworn affidavit, oath, or deposition.

(b) The effective date of this section is October 1, 2008. [~~March 1, 2008.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 9, 2008.

TRD-200803514

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Earliest possible date of adoption: August 24, 2008

For further information, please call: (512) 936-7700

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CHAPTER 215. TRAINING AND EDUCATIONAL PROVIDERS AND RELATED MATTERS

37 TAC §215.5

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §215.5, concerning Contractual Training. Subsection (a) will be amended to add commercial training providers. Subsection (j) is amended to reflect the effective date of these changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there may be an effect on state or local governments as a result of administering this section. The cost may derive from; conducting a training course, the tuition of the training course and in time spent in training.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a benefit to the public by including commercial training providers.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there may be a benefit to small businesses as a result of an increase in demand for training courses.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there may be a cost to individuals as a result of the tuition of the training course and in time spent in training.

Comments may be submitted in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 U.S. 290 East, Austin, Texas 78723.

This amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The proposed amendment is in compliance with Texas Occupations Code, §1701.151, General Powers of Commission; Rulemaking Authority, and §1701.251, Training Programs; Instructors.

No other code, article, or statute is affected by this proposal.

§215.5. Contractual Training.

(a) The commission may, at the discretion of the executive director, enter into a contract with a law enforcement agency, a law enforcement association, alternative delivery trainer, [~~or~~] proprietary training contractor, or commercial training contractor to conduct training for licensees.

(b) - (i) (No change.)

(j) The effective date of this section is October 1, 2008. [~~March 1, 2008.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 9, 2008.

TRD-200803515

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Earliest possible date of adoption: August 24, 2008

For further information, please call: (512) 936-7700

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37 TAC §215.15

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §215.15, concerning Enrollment Standards and Training Credit. "Training Credit" is deleted from the title. The criteria for receiving training credit are contained in the requirements for each type of training provider. Subsection (c) will be amended by replacing academy licensee to licensed academy. Subsection (d) is amended to reflect the effective date of these changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no fiscal implications to state or local governments as a result of administering the proposed amendment.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a benefit to the public by the title accurately reflecting the rule text and the ability of a licensed academy to set additional enrollment standards being clarified.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small businesses or individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 U.S. 290 East, Austin, Texas 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The proposed amendment is in compliance with Texas Occupations Code, §1701.251, Training Programs; Instructors, and §1701.255, Enrollment Qualifications.

No other code, article, or statute is affected by this proposal.

§215.15. Enrollment Standards [~~and Training Credit~~].

(a) - (b) (No change.)

(c) The enrollment standards established in this section do not preclude the licensed academy [~~academy licensee~~] from establishing additional requirements or standards for enrollment in law enforcement training programs.

(d) The effective date of this section is October 1, 2008. [~~June 1, 2006.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 9, 2008.

TRD-200803516

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Earliest possible date of adoption: August 24, 2008

For further information, please call: (512) 936-7700

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CHAPTER 221. PROFICIENCY CERTIFICATES AND OTHER POST-BASIC LICENSES

37 TAC §221.31

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §223.31 concerning Retired Peace Officer Firearms Proficiency. The title is amended to include federal officers in order to reflect the title of Texas Occupations Code §1701.357. Subsection (a) is amended to reflect the retired officers in Texas Occupations Code §1701.357(a)(1). Subsection (b) is amended to reflect the federal officers identified in Texas Occupations Code §1701.357(a)(2) and (3). Subsection (d) is amended to reflect the effective date of these changes.

These amendments are necessary to ensure that the Commission rule is in compliance with the statute, which allows for more honorably retired peace officers and law enforcement officers than previously listed.

The Commission has determined that there will be no fiscal impact to local governments for each year of the first five years the rule will be in effect.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by ensuring that all eligible peace officers, federal criminal investigators, and qualified retired law enforcement officers are allowed to demonstrate weapons proficiency, as authorized by Texas Occupations Code §1701.357.

The Commission has also determined that there may be a positive economic impact for small businesses. With more people eligible for certification, those businesses offering weapons qualification for concealed-carry licensees may see an increase in business.

The Commission has determined that there will be a monetary and time cost to the individual to achieve this proficiency certificate, however there will be a positive benefit for the individual and the public by allowing more qualified individuals to be armed.

Comments may be submitted in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 U.S. 290 East, Austin, Texas 78723.

This amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

This section as proposed is in compliance with Texas Occupations Code, §1701.357, Weapons Proficiency for Certain Retired Peace Officers and Federal Law Enforcement Officers

No other code, article, or statute is affected by this proposal.

§221.31. Retired Peace Officer and Federal Law Enforcement Officer Firearms Proficiency.

(a) The head of a state or local law enforcement agency may allow an honorably retired peace officer the opportunity to demonstrate weapons proficiency [~~issue a proficiency certificate to an honorably retired peace officer~~] in accordance with Occupations Code §1701.357 [~~1701.357~~].

(b) The head of a state law enforcement agency may allow an honorably retired federal criminal investigator or a qualified retired law enforcement officer the opportunity to demonstrate weapons proficiency [~~issue a proficiency certificate to an honorably retired special agent from the Federal Bureau of Investigation or Federal Drug Enforcement Agency~~] in accordance with Occupations Code §1701.357 [~~1701.357~~].

(c) The minimum qualification requirements shall be the same as §217.21(c).

(d) The effective date of this section is October 1, 2008. [~~March 1, 2008.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 9, 2008.

TRD-200803517
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: August 24, 2008
For further information, please call: (512) 936-7700

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CHAPTER 223. ENFORCEMENT

37 TAC §223.19

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to Title 37, Texas Administrative Code by amending §223.19, Revocation of License. Subsection (c)(3) is amended to reflect the expunction requirements of state statutes. Subsection (n) is amended to reflect the effective date of these changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public in that removal of expunction terminology may result in a greater pool of qualified police applicants who can enter into the field of law enforcement.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 U.S. 290 East, Austin, Texas 78723.

This section is proposed for amendment under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

This section as proposed is in compliance with Texas Occupations Code, §1701.151, General Powers of Commission; Rulemaking Authority; §1701.502, Felony Conviction or Placement on Community Supervision; and Code of Criminal Procedure. Art. 55.04, Violation of Expunction Order.

No other code, article, or statute is affected by this proposal.

§223.19. Revocation of License.

(a) The commission shall immediately revoke any license issued by the commission if the licensee is or has been convicted of a felony offense under the laws of this state, another state, or the United States as provided below. The revocation of any license held is effective immediately when the commission receives a certified copy of a court's judgment and issues notice to the licensee that any license held is revoked. Notice of revocation shall be sent via certified U.S. Mail to the address shown on the Texas driver's license record of the licensee and to the address of the agency showing the licensee under current or last appointment.

(b) A deferred adjudication community supervision is not a felony conviction.

(c) A person is convicted of a felony when an adjudication of guilt on a felony offense is entered against that person by a court of competent jurisdiction whether or not:

(1) the sentence is subsequently probated and the person is discharged from community supervision;

(2) the accusation, complaint, information, or indictment against the person is dismissed and the person is released from all penalties and disabilities resulting from the offense; or

~~[(3) the cause has been made the subject of an expunction order; or]~~

(3) [~~(4)~~] the person is pardoned for the offense, unless the pardon is expressly granted for subsequent proof of innocence.

(d) Except as provided by subsection (a) of this section, the commission may revoke the license of a person who is either convicted of a misdemeanor offense or placed on deferred adjudication community supervision for a misdemeanor or felony offense, if the offense directly relates to the duties and responsibilities of any related office held by that person. In determining whether a criminal offense directly relates to such office, the commission shall, under this subsection, consider:

(1) the nature and seriousness of the crime;

(2) the relationship of the crime to the purpose for requiring a license for such office;

(3) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and

(4) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of such office.

(e) The commission shall revoke any license issued by the commission if the licensee:

(1) is or has been discharged from any military service under less than honorable conditions including specifically;

(A) under other than honorable conditions;

(B) bad conduct;

(C) dishonorable; or

(D) any other characterization of service indicating bad character.

(2) has made, submitted, caused to be submitted, or filed a false or untruthful report to the commission;

(3) has been found to be in unauthorized possession of any commission licensing examination or portion of a commission licensing examination, or a reasonable facsimile thereof; or

(4) violates any section where revocation is the penalty noted.

(f) Revocation of a license shall permanently disqualify a person from licensing and a license may not be reinstated except when the licensee proves the facts supporting the revocation have been negated, such as:

(1) the felony conviction has been reversed or set aside on direct or collateral appeal, or a pardon based on subsequent proof of innocence has been issued;

(2) the discharge under less than honorable conditions has been upgraded to honorable conditions;

(3) the report alleged to be false or untruthful was found to be truthful; or

(4) the section was not violated.

(g) During the direct appeal of any appropriate conviction, a license may be conditionally revoked pending resolution of the mandatory direct appeal. The license will remain revoked unless and until the holder proves that the conviction has been set aside on appeal.

(h) The holder of any revoked license may informally petition the executive director for reinstatement of that license based upon proof by the licensee that the facts supporting the revocation have been negated.

(i) If granted, the executive director shall inform the commissioners of such action no later than at their next regular meeting.

(j) If denied, the holder of a revoked license may petition the commission for a hearing to determine reinstatement based upon the same proof.

(k) Once a license has been revoked, the commission shall search its files and send, by regular mail, notice of the action to the chief administrator of any agency shown to have the licensee under either current or latest appointment.

(l) The commission may revoke a license even though it has become inactive by some other means, such as:

(1) expiration;

(2) suspension;

(3) voluntary surrender;

(4) two-year break in service; or

(5) any other means.

(m) The date of revocation will be the earliest date that:

(1) a waiver was signed by the holder; or

(2) a final order of revocation was signed by the commissioners.

(n) The effective date of this section is October 1, 2008. [~~March 1, 2001.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200803518

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Earliest possible date of adoption: August 24, 2008

For further information, please call: (512) 936-7700

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37 TAC §223.20

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to Title 37, Texas Administrative Code by modifying §223.20 Revocation of License for Constitutionally Elected Officials. Subsection (c)(3) is amended to reflect the expunction requirements of state statutes. Subsection (e) is deleted to comply with changes to

Occupations Code §1701.501 during the 80th Legislative Session by House Bill 488.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public in that removal of expunction terminology may result in a greater pool of qualified police applicants who can enter into the field of law enforcement without the taint of criminality.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business or individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 U.S. 290 East, Austin, Texas 78723.

This section is proposed for amendment under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

This section as proposed is in compliance with Texas Occupations Code, §1701.501, Disciplinary Action; §1701.502, Felony Conviction or Placement on Community Supervision; and Code of Criminal Procedure, Art. 55.04, Violation of Expunction Order.

No other code, article, or statute is affected by this proposal.

§223.20. Revocation of License for Constitutionally Elected Officials.

(a) The commission shall immediately revoke any license issued by the commission to a constitutionally elected officer if the licensee is or has been convicted of a felony offense under the laws of this state, another state, or the United States as provided below. The revocation of any license held is effective immediately when the commission receives a certified copy of a court's judgment and issues notice to the licensee that any license held is revoked. Notice of revocation shall be sent via certified U.S. mail to the address shown on the Texas driver's license record of the licensee and to the address of the agency showing the licensee under current or last appointment.

(b) A deferred adjudication community supervision is not a felony conviction.

(c) A constitutionally elected officer is convicted of a felony when an adjudication of guilt on a felony offense is entered against that officer by a court of competent jurisdiction regardless of:

(1) the sentence is subsequently probated and the officer is discharged from community supervision;

(2) the accusation, complaint, information, or indictment against the officer is dismissed and the officer is released from all penalties and disabilities resulting from the offense; or

~~[(3) the cause has been made the subject of an expunction order; or]~~

(3) [~~(4)~~] the officer is pardoned for the offense, unless the pardon is expressly granted for subsequent proof of innocence.

(d) Except as provided by subsection (a) of this section, the commission may revoke the license of a constitutionally elected officer who is either convicted of a misdemeanor offense or placed on deferred adjudication community supervision for a misdemeanor or felony offense, if the offense directly relates to the duties and responsibilities of any related office held by that officer. In determining whether a criminal offense directly relates to such office, the commission shall, under this subsection, consider:

(1) the nature and seriousness of the crime;

(2) the relationship of the crime to the purpose for requiring a license for such office;

(3) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the officer previously had been involved; and

(4) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of such office.

~~[(e) The commission shall revoke any license issued by the commission if the licensee:]~~

~~[(1) is or has been discharged from any military service under less than honorable conditions including specifically;]~~

~~[(A) under other than honorable conditions;]~~

~~[(B) bad conduct;]~~

~~[(C) dishonorable; or]~~

~~[(D) any other characterization of service indicating bad character.]~~

~~[(2) has made, submitted, caused to be submitted, or filed a false or untruthful report to the commission;]~~

~~[(3) has been found to be in unauthorized possession of any commission licensing examination or portion of a commission licensing examination, or a reasonable facsimile thereof; or]~~

~~[(4) violates any section where revocation is the penalty noted.]~~

(e) [~~(f)~~] Revocation of a license shall permanently disqualify a constitutionally elected officer from licensing, and a license may not be reinstated except when the licensee proves the facts supporting the revocation have been negated, such as:

(1) the felony conviction has been reversed or set aside on direct or collateral appeal, or a pardon based on subsequent proof of innocence has been issued;

(2) the discharge under less than honorable conditions has been upgraded to honorable conditions;

(3) the report alleged to be false or untruthful was found to be truthful; or

(4) the section was not violated.

(f) [~~(g)~~] During the direct appeal of any appropriate conviction, a license may be conditionally revoked pending resolution of the mandatory direct appeal. The license will remain revoked unless and until the holder proves that the conviction has been set aside on appeal.

(g) [~~(h)~~] The holder of any revoked license may informally petition the executive director for reinstatement of that license based upon proof by the licensee that the facts supporting the revocation have been negated.

(h) [~~(i)~~] If granted, the executive director shall inform the commissioners of such action no later than at their next regular meeting.

(i) [~~(j)~~] If denied, the holder of a revoked license may petition the commission for a hearing to determine reinstatement based upon the same proof.

(j) [~~(k)~~] Once a license has been revoked, the commission shall search its files and send, by regular mail, notice of the action to the chief administrator or supervising authority of any agency shown to have the licensee under either current or latest appointment.

(k) [~~(l)~~] The commission may revoke a license even though it has become inactive by some other means, such as:

(1) expiration;

(2) suspension;

(3) voluntary surrender;

(4) two-year break in service; or

(5) any other means.

(l) [~~(m)~~] The date of revocation will be the earliest date that:

(1) a waiver was signed by the holder; or

(2) a final order of revocation was signed by the commissioners.

(m) [~~(n)~~] The effective date of this section is October 1, 2008. [~~March 1, 2001.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 9, 2008.

TRD-200803519

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Earliest possible date of adoption: August 24, 2008

For further information, please call: (512) 936-7700

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 5. BOARDS FOR LEASE OF STATE-OWNED LANDS

CHAPTER 201. OPERATIONS OF THE TEXAS PARKS AND WILDLIFE DEPARTMENT AND TEXAS DEPARTMENT OF CRIMINAL JUSTICE BOARD FOR LEASE

31 TAC §§201.3 - 201.5

Proposed amended §§201.3 - 201.5, published in the January 4, 2008, issue of the *Texas Register* (33 TexReg 64), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on July 14, 2008.

TRD-200803578

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 4. MEDICAID HOSPITAL SERVICES

1 TAC §355.8054

The Texas Health and Human Services Commission (HHSC) adopts new §355.8054, concerning Children's Hospital Reimbursement Methodology, with changes to the proposed text as published in the May 30, 2008, issue of the *Texas Register* (33 TexReg 4276). The text of the rule will be republished. Section 355.8054 will supersede the Medicaid children's hospital reimbursement methodology within 1 TAC §355.8063(o) and (r).

This new rule will supersede the children's hospital reimbursement methodologies at §355.8063(o) (in-state children's hospitals) and §355.8063(r) (out-of-state children's hospitals). This rule will separate the Medicaid reimbursement methodologies for children's hospitals into a stand-alone rule to clarify definitions, processes, and timing related to children's hospital reimbursement. The new rule will become effective for claims approved for payment for admissions in state fiscal year 2009. The requirements in §355.8063(o) and (r) will continue to apply to claims approved for payment through state fiscal year 2008.

The new rule will distinguish the TEFRA (Tax Equity and Fiscal Responsibility Act of 1982) cost-based reimbursement methodology for in-state children's hospitals from the prospective payment reimbursement methodology for other hospitals, which is in new §355.8052, Inpatient Hospital Reimbursement Methodology. Additionally, the new rule includes the language from §355.8063(r), regarding the reimbursement methodology for out-of-state children's hospitals, which is derived from the in-state children's hospital methodology.

The rule language for in-state and out-of-state children's hospital reimbursement contained in this new rule is substantially the same as the language in §355.8063(o) and (r).

HHSC received written comments during the 30-day comment period from the Texas Association of Public and Nonprofit Hospitals (TAPNH) and Southwest Mental Health Hospital. A summary of the comments and responses follows.

Comment: TAPNH expressed general support of HHSC's efforts to restructure and clarify the Medicaid reimbursement methodologies for inpatient hospital services.

Response: HHSC appreciates the support of this proposed change and believes that the new rule structure and clarity will be beneficial to HHSC and the provider community. The rule language was not changed in response to the comment.

Comment: TAPNH requested that HHSC clarify whether the reduction factor described at new 1 TAC §355.8052(d)(2), related to Medicaid inpatient hospital reimbursement for hospitals reimbursed based on a prospective payment system, will be applied to the rates used to pay out-of-state children's hospitals. TAPNH recommended that any and all rate reductions applied to Diagnosis Related Group (DRG)-based hospitals in Texas also be applied to out-of-state children's hospitals.

Response: The reduction factor for DRG-based hospitals at §355.8052(d)(2) is associated with staying within available funding from the Texas Legislature for rebasing hospital payment rates. Since HHSC is not rebasing out-of-state hospitals in fiscal year 2009 and thereafter without specific funding to do so, applying a reduction factor to existing out-of-children's hospital rates would not be consistent with the application of the reduction factor. The rule language was not changed in response to the comment.

Comment: TAPNH recommended HHSC clarify that the reimbursement to an out-of-state children's hospital will be calculated by multiplying the payment rate by the respective assigned DRG relative weight described at §355.8052(e).

Response: HHSC's intent was to calculate the reimbursement to out-of-state children's hospitals consistently with calculations made for DRG-based hospitals by multiplying the out-of-state payment rate by the relative weight for the DRG assigned to the adjudicated claim. The following language was added at §355.8054(b)(5) to clarify this process: "(5) HHSC reimburses each out-of-state children's hospital a prospective payment for covered inpatient hospital services. The payment amount is determined by multiplying the result in paragraph (4) of this subsection by the relative weight for the Diagnosis Related Group (DRG) assigned to the adjudicated claim."

Comment: Southwest Mental Health Center recommended the rule be amended to include in-state children-only specialty hospitals, and specifically inpatient children-only freestanding psychiatric hospitals. Additionally, Southwest Mental Health Center recommended that the reimbursement methodology for children's hospitals described in §355.8054 be made retroactive to January 1, 2008.

Response: HHSC recognizes that CMS does not specifically address the situation of a children's hospital that serves only behavioral health patients. CMS rules exempt psychiatric hospitals

and children's hospitals from the inpatient hospital prospective payment system. Texas Medicaid currently reimburses all freestanding psychiatric hospitals consistently with the Medicare psychiatric prospective payment system, but reimburses acute care children's hospitals under a TEFRA-based methodology. HHSC agrees to allow an exception to §355.8063(v) (as renumbered in the amended version), which relates to Medicaid reimbursement of freestanding psychiatric facilities, to allow a freestanding psychiatric facility only treating children under age 21 to be reimbursed as a TEFRA in-state children's hospital. The hospital will be required to meet the criteria prescribed in §355.8063(w) to be eligible for TEFRA reimbursement described in §355.8054(a). The methodology change for children's freestanding psychiatric facilities will become effective with the concurrent amendments to §355.8063.

The new section is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021, and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

§355.8054. Children's Hospital Reimbursement Methodology.

(a) In-state children's hospitals.

(1) HHSC or its designee reimburses in-state children's hospitals under methods and procedures described in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).

(2) For dates of admission on or after September 1, 2003, children's hospitals with allowable Direct Graduate Medical Education (DGME) costs will receive a pro rata share of their annual DGME cost based on available funds appropriated specifically for this purpose.

(3) Interim payments are determined by multiplying a hospital's charges allowed under Medicaid by the interim rate effective on the date of admission. The interim rate is derived from the hospital's most recent tentative or final Medicaid cost report settlement.

(4) The amount and frequency of interim payments will be subject to the availability of funds appropriated for that purpose. Interim payments are subject to settlement at both tentative and final audit of a hospital's cost report.

(5) Cost Settlement.

(A) The cost settlement process is limited by the TEFRA target cap set pursuant to the Social Security Act §1886(b) (42 U.S.C. §1395ww(b)).

(B) Notwithstanding the process in subparagraph (A) of this paragraph, HHSC or its designee uses each hospital's final audited cost report, which covers a fiscal year ending during a base year period, for calculating the TEFRA target cap for a hospital.

(C) HHSC or its designee selects a new base year period for calculating the TEFRA target cap at least every three years.

(D) HHSC or its designee increases a hospital's TEFRA target cap in years in which the target cap is not reset under this paragraph, by multiplying the target cap by the CMS Prospective Payment System Hospital Market Basket Index adjusted to the hospital's fiscal year.

(E) For a newly recognized children's hospital, the base year period for calculating the TEFRA target cap is the hospital's first full 12-month cost reporting period occurring after the effective date of recognition. For each cost reporting period after the hospital's base year period, an increase in the TEFRA target cap will be applied as described in subparagraph (D), until the TEFRA target cap is recalculated in subparagraph (C) of this paragraph.

(6) After a Medicaid participating hospital is recognized by Medicare as a children's hospital, the hospital must submit written notification to HHSC's designee's provider enrollment contact, including documents verifying its status as a Medicare children's hospital. Upon receipt of the written notification from the hospital, HHSC or its designee will convert the hospital to the reimbursement methodology described in this subsection retroactive to the effective date recognized by Medicare.

(b) Out-of-state children's hospitals. HHSC or its designee calculates the prospective payment rate for an out-of-state children's hospital as follows:

(1) HHSC determines the overall average cost per discharge for all in-state children's hospitals by:

(A) Summing the Medicaid allowed cost from tentative or final cost report settlements for the base year; and

(B) Dividing the result in subparagraph (A) of this paragraph by the number of in-state children's hospitals' base year claims described in §355.8052(c)(4) of this title (relating to Inpatient Hospital Reimbursement).

(2) HHSC determines the average relative weight for all of in-state children's hospitals' base year claims described in §355.8052(c)(4) of this title by:

(A) Assigning a relative weight to each claim pursuant to §355.8052(e)(1)(B)(iii) of this title;

(B) Summing the relative weights for all claims; and

(C) Dividing by the number of claims.

(3) The result in paragraph (1) of this subsection is divided by the result in paragraph (2) of this subsection to arrive at the adjusted cost per discharge.

(4) The adjusted cost per discharge in paragraph (3) of this subsection is the payment rate used for payment of claims.

(5) HHSC reimburses each out-of-state children's hospital a prospective payment for covered inpatient hospital services. The payment amount is determined by multiplying the result in paragraph (4) of this subsection by the relative weight for the Diagnosis Related Group (DRG) assigned to the adjudicated claim.

(6) The payment rate is not adjusted for inflation.

(7) HHSC will not recompute the adjusted cost per discharge effective September 1, 2008 or thereafter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 14, 2008.

TRD-200803585
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: August 3, 2008
Proposal publication date: May 30, 2008
For further information, please call: (512) 424-6900

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1 TAC §355.8056

The Texas Health and Human Services Commission (HHSC) adopts new §355.8056, concerning State-Owned Teaching Hospital Reimbursement Methodology, without changes to the proposed text as published in the May 30, 2008, issue of the *Texas Register* (33 TexReg 4277) and will not be republished. Section 355.8056 will supersede the Medicaid inpatient hospital reimbursement methodology for state-owned teaching hospitals at 1 TAC §355.8063.

This new rule will change the Medicaid reimbursement methodology for state-owned teaching hospitals from the current prospective payment reimbursement methodology in §355.8063 to a TEFRA cost-based reimbursement methodology. Creating a new rule for state-owned teaching hospitals will distinguish the TEFRA methodology from the prospective payment methodology used for most other hospitals, which is set out in new §355.8052. The new rules will become effective for claims approved for payment for admissions in state fiscal year 2009. The methodology in §355.8063 will continue to apply to claims approved for payment through state fiscal year 2008.

Because HHSC will change the reimbursement methodology for state-owned teaching hospitals beginning in state fiscal year 2009, these hospitals will be excluded from rate recalculation for state fiscal year 2009. State-owned teaching hospitals will be reimbursed their cost for inpatient hospital services based on their cost report filed at the end of the first state fiscal year after this rule becomes effective. The state-owned teaching hospitals' initial interim rate will be based on their most recent audited tentative or final cost report completed prior to fiscal year 2009.

Finally, this new rule clarifies that direct graduate medical education (DGME) expenses are not considered costs associated with inpatient hospital services and are not settled to cost. Instead, state-owned teaching hospitals will be reimbursed a pro rata share of their annual allowable DGME costs based on the availability of funds appropriated for DGME.

HHSC received written comments during the 30-day comment period from the Texas Association of Public and Nonprofit Hospitals (TAPNH). A summary of the comments and responses follows.

Comment: TAPNH expressed general support of HHSC's efforts to restructure and clarify the reimbursement methodologies for Medicaid inpatient hospital services.

Response: HHSC appreciates the support of this proposed change and believes that the new rule structure and clarity will be beneficial to HHSC and the provider community. The rule language was not changed in response to the comment.

Comment: TAPNH requested assurance that since state-owned teaching facilities are being moved to a TEFRA cost-based reimbursement methodology, these providers will not receive funds designated by the Texas Legislature for hospital rate rebasing. TAPNH's assumption is that the funds appropriated for rebasing are specific to rebasing hospitals that are reimbursed through the DRG-based inpatient hospital reimbursement methodology.

Response: HHSC assures the funds appropriated by the Texas Legislature for the purpose of re-basing inpatient hospital rates will not be used to pay increased amounts to the state-owned teaching hospitals. The fiscal impact associated with changing the state-owned teaching hospitals to a TEFRA cost-based reimbursement methodology will not be included in the assumptions for the fiscal impact of available funds for rebasing inpatient hospital rates. The rule language was not changed in response to the comment.

The new rule is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021, and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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1 TAC §355.8061

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §355.8061, concerning Payment for Hospital Services, without changes to the proposed text as published in the May 30, 2008, issue of the *Texas Register* (33 TexReg 4279) and will not be republished. The amendment references three new rules being adopted by HHSC.

The amendment to §355.8061 adds references to §355.8052, Inpatient Hospital Reimbursement Methodology; §355.8054, Children's Hospital Reimbursement Methodology; and §355.8056, State-Owned Teaching Hospital Reimbursement Methodology. The new references in §355.8061 reflect a concurrent rewrite of §355.8063, Reimbursement Methodology for Inpatient Hospital Services.

HHSC is adopting three new rules to govern Medicaid inpatient hospital reimbursement: §355.8052, Inpatient Hospital Reimbursement Methodology; §355.8054, Children's Hospital Reimbursement Methodology; and §355.8056, State-Owned Teaching Hospital Reimbursement Methodology.

The reimbursement methodology for inpatient hospital reimbursement (other than children's and state-owned teaching hospitals), previously in §355.8063 subsections (a) through (n), and (p) through (q), will be in new §355.8052. The reimbursement methodology for children's hospitals, previously in §355.8063 subsections (o) and (r), will be in new §355.8054. The reimbursement methodology for state-owned teaching hospitals, previously covered in §355.8063, will be in new §355.8056.

These new rules will supersede §355.8063 for claims approved for payment for admissions in state fiscal year 2009. The require-

ments in §355.8063 will continue to apply to claims approved for payment through state fiscal year 2008.

HHSC did not receive comments regarding the proposed rule during the 30-day comment period.

The amendment is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021, and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 14, 2008.

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Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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1 TAC §355.8063

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §355.8063, concerning Reimbursement Methodology for Inpatient Hospital Services, with changes to the proposed text as published in the May 30, 2008, issue of the *Texas Register* (33 TexReg 4280). The text of the rule will be republished. The amendment deletes subsection (u) to discontinue high volume payments made annually to eligible hospitals participating in the Medicaid Disproportionate Share Hospital (DSH) program, and to modify the reimbursement methodology for freestanding psychiatric facilities that primarily treat children under age 21.

This amendment, along with a proposed amendment to §355.8065(f)(2)(D) published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5115), discontinues Medicaid high volume payments and restores Disproportionate Share Hospital (DSH) funds to approximately 60 private urban hospitals.

Prior to state fiscal year 2003, qualifying private urban hospitals received a portion of available Medicaid DSH funds to offset their Medicaid shortfall and uncompensated care costs. In response to a cost containment provision in the 2002-2003 General Appropriations Act (Article II, Special Provisions, Section 33, 77th Legislature, Regular Session, 2001), the DSH payments to these hospitals were reduced. At the same time, HHSC instituted a high volume payment program for these same hospitals.

Currently, five public urban hospitals receive approximately $26,400,000 additional DSH funds as a result of the cost containment adjustments made in the DSH program in 2003. These five public urban hospitals are required to transfer the exact amount of additional DSH funds they receive as a result of the cost containment adjustment to HHSC through an intergovernmental transfer (IGT). HHSC then uses these funds as the state share for the high volume payments referenced in this rule (approximately $10 million) as well as to offset appropriation cuts made by the 77th Legislature (approximately $16 million).

This amendment deleting subsection (u) of §355.8063 removes the high volume payments currently being made annually to the DSH qualified private urban hospitals. The proposed amendment to §355.8065(f)(2)(D) removes the DSH conversion factor language that directs the approximately $26,400,000 to the five public urban hospitals. This removal of the conversion factor will result in $26,400,000 of DSH funds being allocated to the approximately 60 private urban hospitals that were the recipients of the high volume payments being deleted by this amendment. Therefore, these private hospitals will not be impacted in their total Medicaid reimbursement as a result of these rule changes.

The deletion of the high volume payments will result in a loss of approximately $16 million in IGT funds transferred from hospitals to the state general revenue that were used to offset appropriation cuts made by the 77th Legislature. This is the net effect on revenues to all parties of the deletion of the cost containment language in the DSH rule, §355.8065(f)(2)(D), and the deletion of the high volume payment language at §355.8063(u).

There is an additional fiscal impact to state government as a result of HHSC's decision, in response to comments described below, to allow an exemption for children's freestanding psychiatric hospitals to be reimbursed under the in-state children's hospital TEFRA reimbursement methodology. There will be a fiscal impact of $419,112 for state fiscal year (SFY) 2009; $428,122 for SFY 2010; $433,507 for SFY 2011; $433,507 for SFY 2012; and $433,507 for SFY 2013 in state general revenue. There will be no fiscal impact for local governments or local health and human services agencies.

HHSC also is adopting three new rules to govern Medicaid inpatient hospital reimbursement: §355.8052, Inpatient Hospital Reimbursement Methodology; §355.8054, Children's Hospital Reimbursement Methodology; and §355.8056, State-Owned Teaching Hospital Reimbursement Methodology. These new rules will supersede portions of §355.8063 for claims approved for payment for admissions beginning in state fiscal year 2009. The requirements in §355.8063 will continue to apply to claims approved for payment through state fiscal year 2008.

As described below, in response to comments received at the May 8, 2008 Medical Care Advisory Committee (MCAC) meeting and during the 30-day comment period, HHSC also is adding a new subsection (w) to §355.8063 to modify the Medicaid reimbursement methodology for freestanding psychiatric facilities that primarily treat children under age 21.

HHSC received written comments during the 30-day comment period from Southwest Mental Health Center. A summary of the comments and responses follows.

Comment: Southwest Mental Health Center (Southwest) requested that HHSC reimburse children-only freestanding psychiatric facilities as children's hospitals rather than freestanding psychiatric hospitals. Southwest described the change to the Medicare Federal Prospective Payment rates as having a financially devastating impact for children-only freestanding psychiatric facilities. Southwest further stated that the change in prospective payment rates for children-only psychiatric facilities is contrary to the cost differential and exemption for children's hospitals currently recognized by Medicare and Medicaid. Southwest explained that children's mental health care is very expensive due to the required staff-to-child ratios, and stated

that unless it is reimbursed as a children's hospital, it will be unable to provide care at the clinical levels needed for children. Southwest recommended an amendment to new §355.8054, which relates to Medicaid children's hospital reimbursement and is being adopted concurrently with this rule, to recognize children-only specialty hospitals, and specifically inpatient freestanding children-only psychiatric hospitals, as children's hospitals for Medicaid reimbursement purposes. Additionally, Southwest requested that rate changes be made retroactive to January 1, 2008 for hospitals that will be reimbursed under new §355.8054.

Response: HHSC recognizes that CMS does not specifically address the situation of a children's hospital that serves only behavioral health patients. CMS rules exempt psychiatric hospitals and children's hospitals from the inpatient hospital prospective payment system. Texas Medicaid currently reimburses all freestanding psychiatric hospitals consistent with the Medicare psychiatric prospective payment system and reimburses acute care children's hospitals under a TEFRA-based methodology. HHSC agrees to allow an exception to §355.8063(v), which relates to Medicaid reimbursement of freestanding psychiatric facilities, and to allow a freestanding psychiatric facility only treating children under age 21 to be reimbursed as a TEFRA in-state children's hospital. The hospital will be required to meet the criteria prescribed in new §355.8063(w) to be eligible for TEFRA reimbursement described in §355.8054(a). The new subsection (w) will become effective on September 1, 2008.

The amendment is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021, and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

§355.8063. Reimbursement Methodology for Inpatient Hospital Services.

(a) Introduction. Except as otherwise specified in subsection (q) of this section, the Texas Medical Assistance Program (Medicaid) reimburses hospitals, except in-state children's hospitals, for covered inpatient hospital services using a prospective payment system. In-state children's hospitals are reimbursed for covered inpatient hospital services using the methodology described in subsection (o) of this section. For hospitals other than in-state children's hospitals, the Health and Human Services Commission (HHSC) or its designee groups hospitals into payment divisions using the average base year payment per case in each hospital after adjusting each hospital's base year payment per case by a case mix index and a cost-of-living index. The payment divisions are separated into $100 increments. If a payment division has less than ten observations for Medicaid data, the HHSC or its designee considers that payment division to be statistically invalid. Hospitals within that payment division are placed into the nearest valid payment division.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Diagnosis-related group (DRG)--The taxonomy of diagnoses as defined in the Medicare DRG system or as otherwise specified by the HHSC or its designee.

(2) Case mix index--The hospital-specific average relative weight.

(3) Relative weight--The arithmetic mean of the dollars for a specific DRG divided by the arithmetic mean of the dollars for all cases.

(4) Standard dollar amount--The weighted mean base year payment for all hospitals in a payment division after adjusting each hospital's base year payment per case by a case mix index, and a cost-of-living index. The HHSC or its designee establishes a minimum standard dollar amount of $1,600 and applies it to those hospitals whose standard dollar amount is less than the minimum. The HHSC or its designee applies cost-of-living indexes to the standard dollar amounts established for the base year to calculate standard dollar amounts for prospective years. A cost-of-living index is not applied to the minimum standard dollar amount.

(5) Base year--A 12-consecutive-month period of claims data selected by the HHSC or its designee as the basis for establishing the payment divisions, standard dollar amounts, and relative weights. The HHSC or its designee selects a new base year at least every three years.

(6) Base year payment per case--The payment that would have been made to a hospital if the HHSC or its designee reimbursed the hospital under similar methods and procedures used in Title XVIII of the Social Security Act, as amended, effective October 1, 1982, by Public Law 97-248. In calculating the base year payment per case, the HHSC or its designee uses the interim rate established at tentative or final settlement, if applicable, of the most recent cost reporting period up to and including the cost reporting period associated with the base year.

(7) Interim rate--Total reimbursable Title XIX inpatient costs, as specified in paragraph (6) of this subsection, divided by total covered Title XIX inpatient charges per tentative or final cost reporting period. The interim rate established at tentative settlement includes incentive/penalty payments to the extent that they continue to be permitted by federal law and regulation and continue to be included on Title XVIII cost reports.

(8) New hospital--A facility that has been in operation under present and previous ownership for less than three years and that initially enrolls as a Title XIX provider after the current base year. A new hospital must have been substantially constructed within the five previous years from the effective date of the prospective rate period.

(9) Children's hospital--A hospital within Texas that is recognized by Medicare as a children's hospital and is exempted by Medicare from the Medicare prospective payment system.

(10) Out-of-state children's hospital--A hospital outside of Texas that is recognized by Medicare as a children's hospital and is exempted by Medicare from the Medicare prospective payment system.

(c) Calculating relative weights and standard dollar amounts. The HHSC or its designee uses recent Texas claims data to calculate both the relative weights and standard dollar amounts. A relative weight is calculated for each DRG and applied to all payment divisions. A separate standard dollar amount is calculated for each payment division. Except for border hospitals with a Texas Medicaid provider number beginning with an H and out-of-state children's hospitals, the HHSC or its designee uses the overall arithmetic mean base year payment per case, including the cost of living update as specified in subsection (n) of this section, as the standard dollar amount to reimburse out-of-state hospitals. The overall arithmetic mean base year payment per case, including the cost of living update as specified in subsection (n) of this section, is also used as the standard dollar amount to re-

imburse military hospitals providing inpatient emergency services for admissions on or after October 1, 1993. The calculation of the standard dollar amount for out-of-state children's hospitals is described in subsection (r) of this section. Except for new hospitals, the overall arithmetic mean base year payment per case, including the cost of living update as specified in subsection (n) of this section, is also used as the standard dollar amount to reimburse hospitals that initially enroll as a Title XIX provider after the current base year. The standard dollar amount for new hospitals is the lesser of the overall arithmetic mean base year payment per case plus three percentile points, including the cost of living update as specified in subsection (n) of this section, or the hospital's average Medicaid cost per Medicaid discharge based on the tentative or final settlement, if applicable, of the hospital's first 12-month cost reporting period occurring after the hospital's enrollment as a Title XIX provider. In the event that the new hospital is a replacement facility for a hospital that is currently enrolled as a Title XIX provider, the hospital is reimbursed by using either the standard dollar amount of the existing provider or the standard dollar amount for new hospitals, whichever is greater. The use of the hospital's average Medicaid cost per Medicaid discharge, after adjusting for case-mix intensity, as its standard dollar amount is applied prospectively to the beginning of the next prospective year and is applicable only if the tentative or final settlement is completed and available at least 60 days before the beginning of the prospective year. The hospital's Medicaid costs are determined using similar methods and procedures used in Title XVIII of the Social Security Act, as amended, effective October 1, 1982, by Public Law 97-248. When two or more Title XIX participating providers merge, the HHSC or its designee combines the Medicaid inpatient costs, as described in this subsection, of each of the individual providers to calculate a standard dollar amount, effective at the start of the next prospective period, to be used to reimburse the merged entity. Acquisitions and buyouts do not result in a recalculation of the standard dollar amount of the acquired provider unless acquisitions or buyouts result in the purchased or acquired hospital becoming part of another Medicaid participating provider. When the HHSC or its designee determines that the HHSC or its designee has made an error that, if corrected, would result in the standard dollar amount of the provider for which the error was made changing to a new payment division, either higher or lower, the HHSC or its designee moves the provider into the correct payment division, and the HHSC or its designee reprocesses claims paid using the initial, incorrect standard dollar amount that was in effect for the current state fiscal year by using the existing standard dollar amount of the payment division in which the provider was moved. In the determination of the corrected payment division, the HHSC or its designee uses the relative weights that are currently in effect for the state fiscal year. The correction of this error condition only applies to the current state fiscal year payments. No corrections are made to payment rates for services provided in previous state fiscal years. If a specific DRG has less than ten observations for Medicaid data, the HHSC or its designee uses the corresponding Medicare relative weight, except for DRGs relating to organ transplants. Relative weights for organ transplant DRGs with less than ten observations may be developed using Medicaid-specific data. The relative weights include organ procurement costs for both solid and nonsolid organs. The HHSC or its designee makes no distinction between urban and rural hospitals and there is no federal/national portion within the payment.

(d) Add-on payments. There are no separate add-on payments. The HHSC or its designee:

(1) includes capital costs in the standard dollar amount for each payment division;

(2) includes the cost of indirect medical education in the standard dollar amount for each payment division;

(3) includes the cost of malpractice insurance in the standard dollar amount for each payment division; and

(4) includes return on equity in the standard dollar amount for each payment division.

(e) Calculating the payment amount. The HHSC or its designee reimburses each hospital for covered inpatient hospital services by multiplying the standard dollar amount established for the hospital's payment division by the appropriate relative weight. The patient's DRG classification is primarily based on the patient's principal diagnosis. The resulting amount is the payment amount to the hospital.

(f) Patient transfers. If a patient is transferred, the HHSC or its designee establishes payment amounts as specified in paragraphs (1) - (4) of this subsection. If appropriate, the HHSC or its designee manually reviews transfers for medical necessity and appropriate payment.

(1) If the patient is transferred to a skilled nursing facility or intermediate care facility, the HHSC or its designee pays the transferring hospital the total payment amount of the patient's DRG.

(2) If the patient is transferred to another hospital, the HHSC or its designee pays the receiving hospital the total payment amount of the patient's DRG. The HHSC or its designee pays the transferring hospital a DRG per diem. The DRG per diem is based on the following formula: (DRG relative weight x standard dollar amount)/DRG mean length of stay (LOS) x LOS. The LOS is the lesser of the DRG mean LOS, the claim LOS, or 30 days. The 30-day factor is not used in establishing a DRG per diem amount for a medically necessary stay of a recipient less than age one in a Title XIX participating hospital or a recipient less than age six in a disproportionate share hospital as defined by the HHSC.

(3) If the HHSC or its designee determines that the transferring hospital provided a greater amount of care than the receiving hospital, the HHSC or its designee reverses the payment amounts. The transferring hospital is paid the total payment amount of the patient's DRG and the receiving hospital is paid the DRG per diem.

(4) The HHSC or its designee makes multiple transfer payments by applying the per diem formula to the transferring hospitals and the total DRG payment amount to the discharging hospital.

(g) Split billing. The HHSC or its designee does not allow interim billings by providers. The hospital may bill the HHSC or its designee when the patient exceeds his 30-day inpatient hospital limit or is discharged. The HHSC or its designee bases payment on the diagnosis codes known at billing. The payment is final.

(h) Rebasing the standard dollar amounts. The HHSC or its designee rebases the standard dollar amount for each payment division at least every three years. HHSC will not rebase or recalculate the standard dollar amounts for each payment division for admissions during the period September 1, 2003 through August 31, 2008. HHSC will partially rebase state-owned teaching hospitals effective September 1, 2007 ending August 31, 2008, based on FY 2003 cost data inflated to FY 2005 using a cost-of-living index, adjusted proportionately to available funds. The relative weights are recalibrated whenever the standard dollar amounts are recalculated. The standard dollar amounts are not rebased on an interim basis unless the HHSC or its designee determines that special circumstances warrant rebasing.

(i) Recalibrating the relative weights. The HHSC or its designee recalibrates the relative weights whenever the standard dollar amounts are rebased.

(j) Revising the diagnosis related groups. The HHSC or its designee parallels the taxonomy of diagnoses as defined in the Medicare DRG prospective payment system unless a revision is required based

on Texas claims data or other factors as determined by the HHSC or its designee.

(k) Appeals.

(1) A hospital may appeal individual claims as specified in other HHSC rules. As specified in subparagraphs (A) - (C) of this paragraph, a hospital may also appeal mechanical, mathematical, and data entry errors in base year claims data and incorrectly computed subsequent adjustments to the hospital's base year claims data because of the base year's tentative or final settlement.

(A) If a hospital believes that the HHSC or its designee made a mechanical, mathematical, or data entry error in computing the hospital's base year claims data, the hospital may request a review of the disputed calculation by the HHSC or, at the HHSC direction, its designee. A hospital may not request a review if the disputed calculation is the result of the hospital's submittal of incorrect data or the result of the HHSC or its designee's application of an interim rate to the base year claims data derived from a cost reporting period occurring before the base year. Upon the provider hospital's request, the HHSC or its designee provides the applicable available data used in calculating the hospital's base year claims data to the provider hospital. The hospital must submit a specific written request for review and appropriate specific documentation supporting its contention that there has been a mechanical, mathematical, or data entry error to the HHSC or its designee. Except as specified in subparagraph (C) of this paragraph, the request must be submitted within 60 days after the hospital receives initial notification of its payment division and standard dollar amount. The HHSC or its designee conducts the review as quickly as possible and notifies the hospital of the results. If the hospital is dissatisfied with the results of the review, the hospital may request a formal hearing under the procedures, including the expedited processing provisions, except that, in the event of any conflict, the procedures contained in this section apply. Except as specified in subparagraph (C) of this paragraph, if the review or appeal is completed at least 60 days before the beginning of the next prospective year, any adjustment required after the completion of the review or appeal is applied to that next prospective year. If the review or appeal is not completed at least 60 days before the beginning of the next prospective year, any adjustment required after the completion of the review or appeal is applied only to the subsequent prospective year. The base year claims data used by the HHSC or its designee pending the review or appeal is the base year claims data established by the HHSC or its designee.

(B) If a hospital believes that the HHSC or its designee incorrectly computed subsequent adjustments to the hospital's base year claims data because of the base year's tentative or final settlement, the hospital may request a review of the disputed calculation related to the tentative or final settlement by the HHSC or, at the HHSC direction, its designee. The hospital's request may also include a request to review the tentative or final settlement. The hospital must submit a specific written request for review and appropriate specific documentation supporting its contention that the tentative or final settlement is incorrect to the HHSC or its designee. Except as specified in subparagraph (C) of this paragraph, the request must be submitted within 60 days after the hospital receives notification of a tentative or final settlement of the base year data. The HHSC or its designee conducts the review as quickly as possible and notifies the hospital of the results. If the hospital is dissatisfied with the results of the review, the hospital may request a formal hearing under the procedures, including the expedited processing provisions, contained in Chapter 1 of this title (relating to the Texas Board of Health), except that, in the event of any conflict, the procedures contained in this section apply. Except as specified in subparagraph (C) of this paragraph, if the review or appeal is completed at least 60 days before the beginning of the next prospective year, any adjustment required after the completion of the review or appeal is applied to that next prospective year. If the review or appeal is not completed at least 60 days before the beginning of the next prospective year, any adjustment required after the completion of the review or appeal is applied only to the subsequent prospective year. The interim rate applied to the base year claims data pending the review or appeal is the interim rate established by the HHSC or its designee.

(C) If a hospital believes that the HHSC or its designee incorrectly computed the hospital's 1985 base year claims data as specified in subparagraph (A) of this paragraph, the hospital may submit a specific written request for review and appropriate specific documentation supporting its contention within 60 days after the effective date of this section. If a hospital believes that the HHSC or its designee incorrectly computed the tentative or final settlement of the cost reporting period associated with the 1985 base year as specified in subparagraph (B) of this paragraph, the hospital may submit a specific written request for review and appropriate specific documentation supporting its contention within 60 days after the effective date of this section. The hospital must follow the process described in subparagraph (A) or (B) of this paragraph, as appropriate. If the review or appeal is completed by December 31, 1987, any adjustment required after the completion of the review or appeal is applied to the March 1, 1988, adjustment described in subsection (n) of this section. If the review or appeal is not completed by December 31, 1987, any adjustment required after the completion of the review or appeal is applied to the next prospective year.

(2) A hospital may not appeal the prospective payment methodology used by the HHSC or its designee, including:

(A) the payment division methodologies;

(B) the DRGs established;

(C) the methodology for classifying hospital discharges within the DRGs;

(D) the relative weights assigned to the DRGs; and

(E) the amount of payment as being inadequate to cover costs.

(l) Cost reports. Each hospital must submit a cost report at periodic intervals as prescribed by Medicare or as otherwise prescribed by the HHSC or its designee. The HHSC or its designee uses data from these reports in rebasing years, in making adjustments as described in subsections (n) and (q) of this section, and in completing cost settlements for children's hospitals.

(m) Cost settlements. If a hospital has already begun its fiscal year on September 1, 1986, cost settlement for that portion of the hospital's fiscal year which occurs before September 1, 1986, is based on reimbursement for covered inpatient hospital services under similar methods and procedures used in the Social Security Act, Title XVIII, as amended, effective October 1, 1982, by Public Law 97-248. Except as otherwise specified in subsection (q) of this section, there are no cost settlements for services provided to recipients admitted as inpatients to hospitals reimbursed under the prospective payment system on or after the implementation date of the prospective payment system.

(n) Adjustments to base year claims data.

(1) Beginning with 1985 hospital fiscal year cost reporting periods, the HHSC or its designee adjusts each hospital's base year claims data and resulting payment division and standard dollar amount to reflect the interim rate established at tentative and final settlement, if applicable, of the cost reporting period associated with the base year. The adjustments are applied only to claims data for months within the base year that coincide with months within the hospital's cost reporting

period. The claims data for months within the base year that do not coincide with months within the hospital's cost reporting period remain unchanged until the tentative or final settlement of the cost reporting period containing those months has been completed. The adjustments are applied to the next prospective year beginning September 1, 1988, except as specified in subparagraphs (A), (B), and (C) of this paragraph.

(A) If the tentative or final settlement is not completed and available at least 60 days before the beginning of the next prospective year, any adjustment required because of the settlement is applied to the subsequent prospective year.

(B) If a review or appeal of a tentative or final settlement is not completed at least 60 days before the beginning of the next prospective year, the interim rate applied to the claims data on which the hospital's payment division and standard dollar amount are established is the interim rate established at tentative or final settlement by the department or its designee. Any adjustment required after the completion of the review or appeal is applied only to the subsequent prospective year.

(C) The HHSC or its designee makes a March 1, 1988, adjustment.

(2) The HHSC or its designee updates the standard dollar amount each year for each payment division by applying a cost-of-living index to the standard dollar amount established for the base year. The cost-of-living index for state fiscal years 2003, 2004, 2005, 2006, 2007 and 2008 will not be applied to the standard dollar amount for admissions during the period September 1, 2003 through August 31, 2008. The index used to update the standard dollar amounts is the greater of:

(A) the Health Care Financing Administration's (HCFA) Market Basket Forecast (PPS Hospital Input Price Index) based on the report issued for the federal fiscal year quarter ending in March of each year, adjusted for the state fiscal year by summing one-third of the annual forecasted rate of the index for the current calendar year and two-thirds of the annual forecasted rate of the index for the next calendar year; or

(B) an amount determined by selecting the lesser of the following two measures:

(i) the change in total charges per case for the latest year available compared to total charges per case for the previous year; or

(ii) the change in the Texas medical consumer price index-urban (that is, the arithmetic mean of the Houston and Dallas/Fort Worth medical consumer price indices for urban consumers) for the latest year available compared to the Texas medical consumer price index-urban for the previous year.

(o) Reimbursement to in-state children's hospitals. The HHSC or its designee reimburses in-state children's hospitals under similar methods and procedures used in the Social Security Act, Title XVIII, as amended, effective October 1, 1982, by Public Law 97-248, Tax Equity and Fiscal Responsibility Act (TEFRA) except for the cost of direct graduate medical education (DGME). For cost reporting periods beginning on or after September 1, 2003, children's hospitals with allowable DGME costs as determined under TEFRA principles will receive a pro rata share of their annual TEFRA DGME cost based on appropriations or allocations from appropriations made specifically for this purpose. The amount and frequency of interim payments will also be subject to the availability of appropriations made specifically for this purpose. Interim payments are subject to settlement at both tentative and final audit of a hospital's cost report. The HHSC or its designee establishes target rates and stipulates payments per discharge, incentives, and percentage of payments. The HHSC or its designee uses each hospital's 1987 final audited cost reporting period (fiscal year ending during calendar year 1987) as its target base period. The target base period for hospitals recognized by Medicare as children's hospitals after the implementation of this subsection is the hospital's first full 12-month cost reporting period occurring after its recognition by Medicare. The HHSC or its designee annually increases each hospital's target amount for the target base period by the cost-of-living index described in subsection (n) of this section. The HHSC or its designee selects a new target base period at least every three years. The HHSC or its designee bases interim payments to each hospital upon the interim rate derived from the hospital's most recent tentative or final Medicaid cost report settlement. If a Title XIX participating hospital is subsequently recognized by Medicare as a children's hospital after the implementation of this subsection, the hospital must submit written notification to the HHSC or its designee and include adequate documentation and claims data. Upon receipt of the written notification from the hospital, the HHSC or its designee reserves the right to take 90 days to convert the hospital's reimbursement to the reimbursement methodology described in this subsection.

(p) Day and cost outliers. Effective for inpatient hospital services provided on or after July 1, 1991, the HHSC or its designee pays day or cost outliers for medically necessary inpatient services provided to clients less than age one in all Title XIX participating hospitals and clients less than age six in disproportionate share hospitals, as defined by the HHSC, that are reimbursed under the prospective payment system. For purposes of outlier payment adjustments, disproportionate share hospitals are defined as those hospitals identified by the HHSC during the previous state fiscal year as disproportionate share hospitals. If an admission qualifies for both a day and a cost outlier, only the outlier resulting in the highest payment to the hospital is paid. (Note: This subsection does not address reimbursement for the provision of other necessary inpatient hospital services under the Early and Periodic Screening, Diagnosis, and Treatment Program, as required by the Omnibus Budget and Reconciliation Act of 1989.)

(1) To establish day outliers, the HHSC or its designee first removes from the current base year data those admissions whose actual lengths of stay are greater than or equal to plus or minus three standard deviations from the arithmetic mean length of stay for each DRG. The HHSC or its designee then recomputes the arithmetic mean length of stay and the standard deviations for each DRG. Inpatient days, which exceed two standard deviations beyond the arithmetic mean length of stay for the DRG are eligible for a day outlier. Payment is based on 70% of a per diem amount of a full DRG payment. The per diem amount is established by dividing the full DRG payment amount by the arithmetic mean length of stay for the DRG.

(2) To establish cost outliers, the HHSC or its designee first determines what the amount of reimbursement for the admission would have been if the HHSC or its designee reimbursed the hospital under similar methods and procedures used in the Social Security Act, Title XVIII, as amended, effective October 1, 1982, by Public Law 97-248, Tax Equity and Fiscal Responsibility Act (TEFRA). The HHSC or its designee then determines the outlier threshold by using the greater of the full DRG payment amount multiplied by 1.5 or an amount determined by selecting the lesser of the universe mean of the current base year data multiplied by 11.14, or the hospital's standard dollar amount multiplied by 11.14. The hospital's standard dollar amount is the amount that the HHSC or its designee uses to reimburse the hospital under the prospective payment system. The outlier threshold is subtracted from the amount of reimbursement for the admission established under the TEFRA principles. The HHSC or its designee multiplies any remainder by 70% to determine the actual amount of the cost outlier payment.

(3) If a recipient less than age one is admitted to and remains in a hospital past his or her first birthday, medically necessary inpatient days and hospital charges after the child reaches age one are included in calculating the amount of any day or cost outlier payment.

(q) Hospitals in counties with 50,000 or fewer persons and certain other hospitals. Hospitals will be reimbursed the greater of the prospective payment system rate or a cost-reimbursement methodology authorized by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) using the most recent data for Medicaid Fee-for-Service (FFS) and Primary Care Case Management (PCCM) inpatient services if, as of September 1, 2007, the hospital is:

(1) located in a county with 50,000 or fewer persons or;

(2) a Medicare-designated Rural Referral Center (RRC) or Sole Community Hospital (SCH) not located in a metropolitan statistical area (MSA), as defined by the U.S. Office of Management and Budget; or

(3) a Medicare-designated Critical Access Hospital (CAH), shall be reimbursed the greater of the prospective payment system rate or a cost-reimbursement methodology authorized by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) using the most recent data. Hospitals reimbursed under TEFRA cost principles will be paid without the imposition of the TEFRA cap.

(r) Reimbursement to out-of-state children's hospitals. For admissions on or after September 1, 1991, the standard dollar amount for out-of-state children's hospitals is calculated as specified in this subsection. The HHSC or its designee calculates the overall average cost per discharge for in-state children's hospitals based on tentative or final settlement of cost reporting periods ending in calendar year 1990. The overall average cost per discharge is adjusted for intensity of service by dividing it by the average relative weight for all admissions from in-state children's hospitals during state fiscal year 1990 (September 1, 1989 through August 31, 1990). The adjusted cost per discharge is updated each year by applying the cost-of-living index described in subsection (n) of this section. The resulting product is the standard dollar amount to be used for payment of claims as described in subsection (e) of this section. The HHSC or its designee selects a new cost reporting period and admissions period from the in-state children's hospitals at least every three years for the purpose of calculating the standard dollar amount for out-of-state children's hospitals.

(s) Reimbursement of inpatient direct graduate medical education (GME) costs. The Medicaid allowable inpatient direct graduate medical education cost, as specified under similar methods and procedures used in the Social Security Act, Title XVIII, as amended, effective October 1, 1982, by Public Law 97-248, is calculated for each hospital having inpatient direct graduate medical education costs on its tentative or final audited cost report. Those inpatient direct medical education costs are removed from the calculation of the interim rate described in subsection (b)(7) of this section and not used in the calculation of the provider's standard dollar amount described in subsection (c) of this section. Those allowable inpatient direct graduate medical education costs for services delivered to Medicaid eligible patients with inpatient admission dates on or after September 1, 1997, will be subject to the cost determination and settlement provisions as described in this subsection. No Medicaid inpatient direct graduate medical education cost settlement provisions are applied to inpatient hospital admissions prior to September 1, 1997. For cost reporting periods beginning on or after September 1, 2003, providers with Medicaid allowable direct graduate medical education costs as described in this subsection will receive a pro rata share of their annual GME cost based on appropriations or allocations from appropriations made specifically for this purpose. The amount and frequency of interim payments will also be subject to the availability of appropriations made specifically for this purpose. Interim payments are subject to settlement at both tentative and final audit of a provider's cost report.

(t) Non-State Owned Hospital Supplemental Inpatient Payments. Notwithstanding other provisions of this chapter, supplemental payments will be made each state fiscal year in accordance with this subsection to eligible hospitals that serve high volumes of Medicaid and uninsured patients.

(1) Supplemental payments are available under this subsection for inpatient hospital services provided by a publicly-owned hospital or hospital affiliated with a hospital district in Bexar, Dallas, Ector, El Paso, Harris, Lubbock, Nueces, Midland, Potter, Randall, Tarrant, and Travis counties. Supplemental payments will be made for inpatient services on or after July 6, 2001, for Bexar, Dallas, Ector, El Paso, Harris, Lubbock, Nueces, Tarrant, and Travis counties. Supplemental payments will be made for inpatient services on or after February 7, 2004, for Midland County. Supplemental payments will be made for inpatient services on or after May 29, 2004 for Potter and Randall counties.

(2) State funding for supplemental payments authorized under this paragraph will be limited to and obtained through intergovernmental transfers of local or hospital district funds. The supplemental payments described in this paragraph will be made in accordance with the applicable regulations regarding the Medicaid upper limit provisions codified at 42 C.F.R. §447.272.

(3) In each county listed in paragraph (1) of this subsection, the publicly-owned hospital or hospital affiliated with a hospital district that incurs the greatest amount of cost for providing services to Medicaid and uninsured patients, will be eligible to receive supplemental high volume payments. The supplemental payments authorized under this paragraph are subject to the following limits:

(A) In each state fiscal year the amount of any inpatient supplemental payments and outpatient supplemental payments may not exceed the hospital's "hospital specific limit," as determined under §355.8065(f)(2)(E) of this chapter (relating to Reimbursement to Disproportionate Share Hospitals (DSH)) for DSH hospitals; and

(B) The amount of inpatient supplemental payments and fee-for-service Medicaid inpatient payments the hospital receives in a state fiscal year may not exceed Medicaid inpatient billed charges for inpatient services provided by the hospital to fee-for-service Medicaid recipients in accordance with 42 CFR §447.271.

(4) Notwithstanding the provisions of paragraphs (1) - (3) of this subsection, a privately-operated hospital that executes an indigent care affiliation agreement (as defined in this subsection) with a hospital district or state or local governmental entity is eligible to receive supplemental payments under this paragraph. The purpose of the affiliation is to pay for unreimbursed care to the Medicaid population to ensure the continued viability of the communities' Medicaid providers.

(A) Supplemental payments will be made for inpatient services on or after June 11, 2005, for eligible hospitals in Hidalgo, Maverick, Montgomery, Travis, Bexar, and Webb counties. Supplemental payments will be made for inpatient services on or after November 12, 2005, for eligible hospitals in all other counties in the State of Texas.

(B) A hospital that is eligible to receive supplemental payments under this paragraph must provide a copy of the fully executed indigent care affiliation agreement to HHSC prior to payment of any supplemental funds under this paragraph.

(C) An eligible hospital must certify, on a form prescribed by HHSC and prior to payment of any supplemental funds under this paragraph, the following:

(i) No part of any supplemental payment paid to the hospital under this paragraph will be returned or reimbursed to the hospital district or state or local governmental entity;

(ii) No part of any supplemental payment paid to the hospital under this paragraph will be used to pay a contingent fee, consulting fee, or legal fee associated with the hospital's receipt of the supplemental funds; and

(iii) The person signing the certification on behalf of the hospital is legally authorized to bind the hospital and to certify the matters described in the certification.

(D) A hospital district or state or local governmental entity must certify, on a form prescribed by HHSC and prior to payment of any supplemental funds under this paragraph, the following:

(i) The hospital district or state or local governmental entity has not received and has no agreement to receive, any portion of the funds paid to an eligible hospital that has executed an affiliation agreement with the hospital district or state or local governmental entity;

(ii) The hospital district or state or local governmental entity has not entered into a contingent fee arrangement related to the hospital district's or state or local governmental entity's participation in the supplemental payment program authorized under this paragraph;

(iii) The hospital district or state or local governmental entity is authorized to participate in the supplemental payment program authorized under this paragraph pursuant to a vote of the hospital district's or state or local governmental entity's governing body in a public meeting preceded by public notice published in accordance with the hospital district's or state or local governmental entity's usual and customary practices or the Texas Open Meetings Act, as applicable;

(iv) All affiliation agreements, consulting agreements, or legal services agreements executed by the hospital district or state or local governmental entity related to the hospital district's or state or local governmental entity's participation in the supplemental payment program authorized under this paragraph are available for public inspection upon request.

(E) Beginning August 31, 2008, each participating hospital and hospital district or state or local governmental entity must submit a fully executed indigent care affiliation agreement as well as certification forms on or before August 31st of each fiscal year to be eligible to receive supplemental payments under this paragraph during the following fiscal year.

(F) If the federal Centers for Medicare and Medicaid Services (CMS), the United States Department of Health and Human Services, or other responsible legal authority recoups federal financial participation related to an eligible hospital's receipt and/or use of supplemental payments authorized under this paragraph, HHSC may recoup an amount equivalent to the amount of supplemental payments recouped by CMS. Supplemental payments under this paragraph may be subject to any adjustments for payments made in error, including, without limitation, adjustments under §371.1703 of this title (relating to recovery of overpayments), 42 C.F.R. part 455, and chapter 403, Texas Government Code. HHSC will send a notice of recoupment to the hospital and will recoup from any current or future Medicaid payments as follows:

(i) HHSC will recoup from the hospital against which the disallowance was directed;

(ii) If, within 30 days of the hospital's receipt of HHSC's written notice of recoupment, the hospital has not paid the full amount of the recoupment or entered into an agreement, in writing, with HHSC, HHSC may withhold any or all Medicaid payments from the hospital until such time as HHSC has recovered an amount equal to the hospital's disallowance. If HHSC determines that recovery through a withhold is not feasible, HHSC may recover the amount of the CMS recoupment from the other affiliated hospitals that are a party to the same indigent care affiliation under this paragraph through a withhold of any or all Medicaid payments until such time as HHSC has recovered an amount equal to the hospital's disallowance unless the recoupment is prohibited by law.

(G) Funding of supplemental payments under this paragraph shall be disbursed as follows:

(i) Supplemental payments available under this paragraph shall be payable to a hospital affiliated with a hospital district or state or local governmental entity in proportion to the amount transferred by the hospital district or state or local governmental entity affiliated with the private hospital, subject to legislative appropriation. Such supplemental payments will be based on calculations made by HHSC and will be made quarterly, beginning April 1, 2007.

(ii) If a hospital district or state or local governmental entity does not transfer to HHSC sufficient funding for the time period specified to generate the full amount allowable under this paragraph, each hospital affiliated with that hospital district or state or local governmental entity will receive a portion of the supplemental payment under paragraph (5) of this subsection based on that hospital's percentage of the full entitlement for all hospitals affiliated with that hospital district or state or local governmental entity.

(iii) HHSC will issue one supplemental payment for a hospital for inpatient services the hospital provided on or before August 31, 2006, if the hospital meets the criteria of subparagraphs (A) - (C) of this paragraph no later than May 31, 2007, and if a sufficient amount of funds (as determined by HHSC) are transferred to HHSC to support the one-time supplemental payment no later than December 1, 2007. A hospital district or state or local governmental entity must notify HHSC in a manner prescribed by HHSC of the date it intends to transfer funds related to the supplement payment authorized under this subparagraph. The supplemental payment will be processed for each participating hospital based on the amount of funds transferred to HHSC up to the calculated maximum payment for the applicable retroactive time period. A hospital that satisfies the criteria of subparagraphs (A) - (C) of this paragraph after May 31, 2007, will not be eligible for the supplemental payment authorized under this subparagraph but will be eligible to receive regular supplemental payments under paragraph (5) of this subsection. If the full amount of the calculated intergovernmental transfer (IGT) transfer is not made by the transfer deadlines specified by HHSC, the supplemental payment for that time period will be calculated based on the amount of the funds transferred. Regular quarterly supplemental payments for state fiscal year 2007 for which IGT funds are received will be made, beginning in April 2007, to each participating hospital for which a copy of the fully executed indigent care affiliation agreement, as well as any required certification forms, have been timely received.

(iv) Annual retroactive supplemental payments will be processed once for each state fiscal year, beginning with state fiscal year 2007, in September of the following calendar year (September 2008 for state fiscal year 2007) provided HHSC determines there is sufficient room available for funding under the applicable aggregate

upper payment limit for private hospitals. Hospital districts or state or local governmental entities must notify HHSC Rate Analysis in a manner prescribed by HHSC if they intend to transfer funds related to the annual retroactive payments. If HHSC determines that the retroactive funding claimed pursuant to this clause will exceed the applicable aggregate upper payment limit for private hospitals, HHSC will reduce the amount of the transfer for the retroactive payment under this clause proportionately for each participating private hospital in an amount sufficient to ensure compliance with the applicable aggregate upper payment limit. If the retroactive supplemental payment calculation results in the verification that a specific hospital or hospitals were overpaid for the retroactive time period, HHSC will initiate the same process as outlined in subparagraph (F)(i) - (ii) of this paragraph to recover the amount of the overpayment.

(H) State funding for supplemental payments authorized under this paragraph will be limited to and obtained through intergovernmental transfers of local governmental entity or hospital district funds or transfer of State General Revenue. The supplemental payments described in this subsection will be made in accordance with the applicable regulations regarding the Medicaid upper limit provisions codified at 42 C.F.R. §447.272.

(5) An eligible hospital under this subsection will receive quarterly supplemental payments. The quarterly payments will be limited to one-fourth of the lesser of:

(A) The difference between the hospital's Medicaid inpatient billed charges and Medicaid payments the hospital receives for services provided to fee-for-service Medicaid recipients. Medicaid billed charges and payments will be based on a twelve consecutive-month period of fee-for-service claims data selected by HHSC; or

(B) The difference between the hospital's "hospital specific limit," as determined under §355.8065(f)(2)(E) of this chapter relating to Reimbursement to Disproportionate Share Hospitals (DSH)) for DSH hospitals and the hospital's DSH payments as determined by the most recently finalized DSH reporting period.

(6) For purposes of calculating the "hospital specific limit" in paragraph (5)(B) of this subsection, the "cost of services to uninsured patients, " as defined by §355.8065(b)(5) of this chapter and "Medicaid shortfall," as defined by §355.8065(b)(16) of this chapter, will be adjusted as follows:

(A) The amount of Medicaid payments (including inpatient and outpatient supplemental payments) that exceed Medicaid cost will be subtracted from the "Medicaid shortfall."

(B) The amount of the "Medicaid shortfall," as adjusted in accordance with subparagraph (A) of this paragraph, will be subtracted from the "cost of services to uninsured patients" to ensure that, during any state fiscal year, a hospital does not receive more in total Medicaid payments (inpatient and outpatient rate payments, graduate medical education payments, supplemental payments and disproportionate share hospital payments) than its cost of serving Medicaid patients and patients with no health insurance.

(u) State Owned Hospital Supplemental Inpatient Payments. Notwithstanding other provisions of this attachment, supplemental payments will be made each state fiscal year in accordance with this subsection to state government-owned or operated hospitals for inpatient services provided to Medicaid patients.

(1) Supplemental payments are available under this subsection for inpatient hospital services provided by state government-owned or operated hospitals on or after December 13, 2003. To qualify for a supplemental payment, the hospital must be owned or operated by the state of Texas.

(2) The aggregate supplemental payment amount will be the annual difference between the aggregate upper payment limit and the inpatient fee-for-service Medicaid payments made to the state government-owned or operated hospitals under this attachment. The aggregate upper payment limit will be calculated, based on Medicare payment principles and in accordance with the federal upper limit regulations at 42 CFR §447.272, using the most recent cost report data available.

(3) The amount of the supplemental payment made to each state government-owned or operated hospital will be determined by:

(A) dividing each hospital's fee-for-service Medicaid payments by the sum of the Medicaid fee-for-service payments of all state government-owned of operated hospitals;

(B) multiplying the percentage calculated in subparagraph (A) of this paragraph by the aggregate supplemental payment calculated in paragraph (2) of this subsection.

(4) Supplemental payments determined under this subsection will be calculated annually and paid quarterly.

(5) Supplemental payments made under this subsection when combined with other inpatient payments made under this section shall not exceed the maximum amounts allowable under applicable federal regulations at 42 CFR §447.271.

(v) Reimbursement to freestanding psychiatric facilities. Effective January 1, 2008, HHSC or its designee reimburses freestanding psychiatric facilities under the prospective payment system, a hospital-specific per diem rate. The per diem rate will be determined based upon the Medicare federal base per diem for inpatient psychiatric facilities with facility-based adjustments for wages, rural location, and length of stay as determined by Medicare, to the extent possible within available funds. HHSC or its designee will not cost settle for services provided to recipients admitted as inpatients to freestanding psychiatric facilities reimbursed under the prospective payment system on or after the implementation date of the prospective payment system. The freestanding psychiatric inpatient per diem rates are for Medicaid clients under 21 years of age. Per diem rates will be increased only if the Texas Legislature appropriates funds for this specific purpose.

(w) Reimbursement to children's freestanding psychiatric facilities. On or after September 1, 2008, an in-state freestanding psychiatric facility that primarily serves individuals under the age of 21 will be exempted from the freestanding psychiatric facility prospective payment system methodology described in subsection (v) of this section and instead reimbursed as an in-state children's hospital as described in §355.8054 of this title if the facility meets the following requirements:

(1) After a Medicaid participating freestanding psychiatric hospital is recognized by Medicare as a freestanding psychiatric facility, it must request of HHSC or its designee that the facility be reimbursed as a children's hospital. The hospital must submit its request on or after September 1, 2008, in writing, to HHSC or its designee's provider enrollment contact and include documentation showing that during the previous two hospital fiscal years, at least 95 percent of the facility's total inpatient days were for services to individuals under the age of 21. HHSC will cost settle the annual cost report for the hospital fiscal year in which the request was submitted.

(2) After a freestanding psychiatric hospital has been recognized by HHSC as a children's hospital, for continued recognition as a children's hospital, it must annually submit to HHSC's Medicaid Audit Division documentation with its annual cost report showing that at least 95 percent of its total inpatient days were for services to individuals under the age of 21. A hospital that does not meet this 95 percent

threshold based on its annual cost report will be reimbursed based on the prospective hospital-specific per diem rate as described in subsection (v) of this section, effective the first day of the hospital fiscal year following the cost reporting period in which the hospital did not meet the 95 percent threshold.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 14, 2008.

TRD-200803588
Steve Aragón
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Texas Health and Human Services Commission
Effective date: August 3, 2008
Proposal publication date: May 30, 2008
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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 3. BOLL WEEVIL ERADICATION PROGRAM

The Texas Department of Agriculture (the department) adopts amendments to Chapter 3, Subchapter B, §3.20 and the repeal of §3.21, concerning the department's Boll Weevil Eradication Program, without changes to the proposal published in the May 30, 2008, issue of the *Texas Register* (33 TexReg 4282). The amendments to §3.20 are made to update language in the section relating to the enabling legislation and authority of the Texas Boll Weevil Eradication Foundation (Foundation) to adopt rules. The repeal of §3.21, relating to rule consistency and approval, is adopted to repeal an outdated section. The Foundation is no longer authorized to adopt rules, which makes this section unnecessary.

No comments were received on the proposal.

SUBCHAPTER B. ESTABLISHMENT OF RULES, PROCEDURES, AND METHODS OF TREATMENT

4 TAC §3.20

The amendments to §3.20 are adopted under the Texas Agriculture Code, §74.120 which authorizes the department to adopt reasonable rules necessary to carry out the purposes of Chapter 74, Subchapter D, relating to the boll weevil eradication foundation program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 10, 2008.

TRD-200803535
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: July 30, 2008
Proposal publication date: May 30, 2008
For further information, please call: (512) 463-4075

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SUBCHAPTER B. ESTABLISHMENT OF FOUNDATION RULES, PROCEDURES, AND METHODS OF TREATMENT

4 TAC §3.21

The repeal of §3.21 is adopted under the Texas Agriculture Code, §74.120 which authorizes the department to adopt reasonable rules necessary to carry out the purposes of Chapter 74, Subchapter D, relating to the boll weevil eradication foundation program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200803536
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TITLE 13. CULTURAL RESOURCES

PART 8. TEXAS FILM COMMISSION

CHAPTER 122. TEMPORARY USE OF STATE BUILDINGS AND GROUNDS BY TELEVISION OR FILM PRODUCTION COMPANIES

13 TAC §§122.2, 122.4, 122.7

The Office of the Governor, Texas Film Commission (Commission) adopts an amendment to §122.2, the definitions for Chapter 122; an amendment to §122.4, concerning a projects ineligibility to use a state property for production activity; and an amendment to §122.7, concerning an Applicant's responsibilities. These rules are adopted without changes to the proposed text as published in the June 6, 2008, issue of the *Texas Register* (33 TexReg 4442) and will not be republished.

The amendments add language to §122.2(11) and §122.7(d) to clarify the responsibilities of a production company wishing to use a state property. The amendment to §122.4(a)(2) clarifies how an Applicant would be ineligible to use a state property. Legislation enacted in 2007 set forth these guidelines and established the oversight by the Texas Film Commission for the use of the state property.

The amendments provide a clearer understanding of how state property may be used for production activity and how the use of state property will be administered by the Commission.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to the Texas Government Code §2165.008 which directs the Commission to develop procedures to allow production companies to use state property for production activity, and Government Code, Chapter 2001, Subchapter B which prescribes the standards for rulemaking by state agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 10, 2008.

TRD-200803540
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Assistant General Counsel
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Effective date: July 30, 2008
Proposal publication date: June 6, 2008
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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 97. PLANNING AND ACCOUNTABILITY

SUBCHAPTER AA. ACCOUNTABILITY AND PERFORMANCE MONITORING

19 TAC §97.1001

(Editor's note: In accordance with Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 19 TAC §97.1001 is not included in the print version of the Texas Register. The figure is available in the on-line version of the July 25, 2008, issue of the Texas Register.)

The Texas Education Agency (TEA) adopts an amendment to §97.1001, concerning accountability. The amendment is adopted with changes to the proposed text as published in the May 30, 2008, issue of the *Texas Register* (33 TexReg 4284). The section describes the state accountability rating system and annually adopts the most current accountability manual. The amendment adopts applicable excerpts of the *2008 Accountability Manual*. Earlier versions of the manual will remain in effect with respect to the school years for which they were developed.

Legal counsel with the TEA has recommended that the procedures for issuing accountability ratings for public school districts and campuses be adopted as part of the *Texas Administrative Code*. This decision was made in 2000 given a court decision challenging state agency decision making via administrative letter/publications. Given the statewide application of the accountability rating process and the existence of sufficient statutory authority for the commissioner of education to formally adopt rules in this area, portions of each annual accountability manual have been adopted since 2000. The accountability system evolves from year to year so the criteria and standards for rating and acknowledging schools in the most current year differ to some degree over those applied in the prior year. The intention is to annually update 19 TAC §97.1001 to refer to the most recently published accountability manual.

The amendment to 19 TAC §97.1001 adopts excerpts of the *2008 Accountability Manual* into rule as a figure. The excerpts, *Chapters 2-6, 8, 10-13,* and *15-17* of the *2008 Accountability Manual*, specify the indicators, standards, and procedures used by the commissioner of education to determine accountability ratings, both standard and alternative education accountability (AEA), for districts, campuses, and charter schools. These chapters also specify indicators, standards, and procedures used to determine Gold Performance Acknowledgment (GPA) on additional indicators for Texas public school districts and campuses. The TEA will issue accountability ratings under the procedures specified in the *2008 Accountability Manual* by August 1, 2008. Ratings may be revised as a result of investigative activities by the commissioner as authorized under Texas Education Code, §39.074 and §39.075.

In 2008, campuses and districts will be evaluated using three base indicators: Texas Assessment of Knowledge and Skills (TAKS) results, completion rates, and annual dropout rates. In 2008, the GPA system will award acknowledgment on up to 14 separate indicators to districts and campuses rated *Academically Acceptable, AEA Academically Acceptable,* or higher: Attendance Rate for Grades 1-12; Advanced Course/Dual Enrollment Completion; Advanced Placement/International Baccalaureate Results; College Admissions Test Results; Commended Performance on Reading/English Language Arts (ELA), Mathematics, Writing, Science and/or Social Studies; Recommended High School Program/Distinguished Achievement Program Participation; Comparable Improvement on Reading/ELA and Mathematics; and Texas Success Initiative - Higher Education Readiness Component on ELA and/or Mathematics.

The adopted amendment also modifies subsection (e) to specify that accountability manuals adopted for school years prior to 2008-2009 will remain in effect with respect to those school years.

The TEA determined that the adopted amendment will have no direct adverse economic impact for small businesses or microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal began May 30, 2008, and ended June 30, 2008. Following is a summary of the public comments received and corresponding agency responses regarding the proposed amendment to 19 TAC Chapter 97, Planning and Accountability, Subchapter AA, Accountability and Performance Monitoring, §97.1001, Accountability Rating System.

Comment. Concerning §97.1001, 20 districts and three professional organizations, constituting over 200 individual comments, requested that the School Leaver Provision (SLP) be applied to the completion rate and annual dropout rate indicators for the 2008 and 2009 accountability years. Twelve of the districts requested the provision extend longer--through the 2010, 2011, or 2012 accountability years. The 20 districts represented by the individual comments were: Alief Independent School District (ISD), Carrollton-Farmers Branch ISD, Cypress Fairbanks ISD, Galena Park ISD, Goose Creek ISD, Granbury ISD, Humble ISD,

Kerrville ISD, Klein ISD, Northside ISD, Pearland ISD, Round Rock ISD, Dallas ISD, Corpus Christi ISD, Kingsville ISD, Seguin ISD, Fort Bend ISD, Houston ISD, Pasadena ISD, and Lubbock ISD. The three professional organizations were the Texas Association of School Boards, the Texas Association of School Administrators, and the Texas School Alliance. Comments were received from superintendents, assistant superintendents, other central office administrators, teachers and other district employees, principals, school board members, and others with no affiliation specified.

Agency Response. During the development of the 2008 accountability system procedures, the Educator Focus Group and the Commissioner's Accountability Advisory Committee (CAAC) reviewed and discussed the continuing impact of the new National Center for Education Statistics (NCES) dropout definition on both dropout and completion rate indicators.

These advisory groups were given the class of 2006 completion rate results and the annual dropout rate results for the 2005-2006 school year that were based on the first year of the new dropout definition. However, two years of data were not available in spring 2008 to inform the advisory groups on the dual impact of the second year of the new dropout definition and the increase in the student passing standard on the Texas Assessment of Knowledge and Skills (TAKS) exit-level tests. While adjustments were made to some of the leaver indicators for 2008 based on the first year of data under the new definition, it was not possible to determine the impact of these changes using actual data based on two years of results.

The advisory groups were also informed that the passing standard on the TAKS exit-level test contributed toward more rigorous graduation requirements for students in the class of 2007. This class was the first required to graduate under TAKS exit-level tests based on the panel recommended student passing standards. Also, the changes to graduation requirements to comply with attainment of the "4 x 4" curriculum that began with 2007-2008 ninth graders will impact the class of 2011, the first to graduate having completed four years of study in each of four core academic areas.

The advisory groups understood that the rigor of the completion rate indicator will continue to increase incrementally each year until the NCES definition of a dropout is fully phased-in in 2010. Based on a review of one year of dropout/completion data under the NCES definition, they recommended that the standards for Completion Rate I should remain constant, since each year it is more difficult to continue to achieve those standards during the phase-in period.

Although the completion rate and annual dropout rate indicators did not change in name, these indicators have a different definition and impact than under the prior dropout definition. The agency acknowledges that the completion rate indicator will continue to be altered for two more years until all years of the cohort are subject to the new dropout definition. The agency, therefore, agrees that the SLP should extend through the 2008 accountability year and should apply to all leaver indicators evaluated under standard procedures as it did in 2007; namely, the Grade 7-8 Annual Dropout Rate, the Completion Rate I (graduates and continuers), and the Underreported Students indicators. In addition, the agency will also apply the SLP to Completion Rate II (graduates, continuers, and GED recipients) used under Alternative Education Accountability (AEA) procedures, since many of the rationales provided by comments are applicable to both Completion Rate I and Completion Rate II.

Since the proposed amendment pertains only to the 2008 accountability ratings, comments regarding the extension of the SLP provision beyond the 2008 accountability year are not applicable. However, during the development of the 2009 accountability system procedures, the agency will undertake a comprehensive review of the use of the leaver indicators in the state accountability system to determine whether the SLP should be continued, removed, or modified for 2009 and beyond accountability ratings.

Comment. Weatherford ISD suggested a phase-in for the use of the completion rate with one possible way being to count only the All Students completion rate for 2008 with a future phase-in of the other student groups.

Agency Response. The agency agrees with the recommendation to phase in the use of the completion rate, though the mechanism used for 2008 will be the SLP which applies to All Students as well as the individual student groups.

Comment. Lake Travis ISD submitted a comment stating that the rounding methodology for determining the student group percents should be modified such that any percentage less than 10% prior to any rounding is considered not to have met the minimum student group size criteria.

Agency Response. The agency disagrees but has added text to the figure adopted as rule to clarify the formula for calculating the student group percent. The methodology used to calculate the student group percent is consistent with the methodology used beginning with the 2004 ratings and mirrors the calculation used to determine percent passing rates for the assessment indicators.

Comment. Galena Park ISD and Round Rock ISD requested application of the Exceptions Provision to the Completion Rate I and the Grade 7-8 Annual Dropout Rate indicators. Comments submitted on behalf of Alief ISD and Humble ISD also mentioned the lack of use of the Exceptions Provision with these indicators is inconsistent and noted that use of SLP would compensate for this inconsistency.

Agency Response. The agency disagrees and has maintained language as published as proposed for 2008. Application of the Exception Provision was considered during the development cycle and not chosen as an option. Use of the SLP negates the impact the Exceptions Provision could have on these indicators.

Comment. Carrollton-Farmers Branch ISD commented that the completion rate definition should be modified to include students who take longer than five years to complete high school as completers in the accountability system.

Agency Response. The agency disagrees and has maintained language as published as proposed for 2008. The 75% standard established for the completion rate already takes into account these types of specific circumstances within an individual campus or district.

The amendment is adopted under the Texas Education Code, §§39.051(c) - (d), 39.072(c), 39.0721, 39.073, and 29.081(e), which authorize the commissioner of education to specify the indicators, standards, and procedures used to determine standard accountability ratings and alternative education accountability ratings, and to determine acknowledgment on additional indicators.

The amendment implements the Texas Education Code, §§39.051(c) - (d), 39.072(c), 39.0721, 39.073, and 29.081(e).

§97.1001. Accountability Rating System.

(a) The rating standards established by the commissioner of education under Texas Education Code (TEC), §39.051(c) and (d), shall be used to evaluate the performance of districts, campuses, and charter schools. The indicators, standards, and procedures used to determine ratings under both standard and alternative education accountability (AEA) procedures will be annually published in official Texas Education Agency publications. These publications will be widely disseminated and cover the following procedures:

(1) indicators, standards, and procedures used to determine district ratings;

(2) indicators, standards, and procedures used to determine campus ratings;

(3) indicators, standards, and procedures used to determine acknowledgment on Additional Indicators; and

(4) procedures for submitting a rating appeal.

(b) The standard and alternative procedures by which districts, campuses, and charter schools are rated and acknowledged for 2008 are based upon specific criteria and calculations, which are described in excerpted sections of the *2008 Accountability Manual* provided in this subsection.
Figure: 19 TAC §97.1001(b)

(c) Ratings may be revised as a result of investigative activities by the commissioner as authorized under TEC, §39.074 and §39.075.

(d) The specific criteria and calculations used in the accountability manual are established annually by the commissioner of education and communicated to all school districts and charter schools.

(e) The specific criteria and calculations used in the annual accountability manual adopted for school years prior to 2008-2009 remain in effect for all purposes, including accountability, data standards, and audits, with respect to those school years.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 11, 2008.

TRD-200803550
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Effective date: July 31, 2008
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CHAPTER 102. EDUCATIONAL PROGRAMS SUBCHAPTER EE. COMMISSIONER'S RULES CONCERNING PILOT PROGRAMS

19 TAC §102.1054

The Texas Education Agency (TEA) adopts new §102.1054, concerning the Intensive Summer Pilot Program. The new section is adopted with changes to the proposed text as published in the April 25, 2008, issue of the *Texas Register* (33 TexReg 3370). The adopted new rule implements the requirements of the Texas Education Code (TEC), §29.098, as added by House Bill (HB) 2237, 80th Texas Legislature, 2007, which requires the commissioner of education to establish by rule procedures for the awarding of grants for intensive summer programs.

HB 2237, 80th Texas Legislature, 2007, added the TEC, §29.098, requiring the commissioners of education and higher education to establish by rule a pilot program to award grants to participating campuses to provide intensive academic instruction during the summer to students identified as being at risk of dropping out of school or college. The commissioner of higher education is responsible for establishing rules to implement a program administered by institutions of higher education to provide intensive academic instruction to facilitate a student's transition from high school to a postsecondary institution. The commissioner of education is responsible to establish rules to implement programs administered by school districts to promote high school completion and college readiness through intensive academic instruction in: (1) English language arts, mathematics, and science, and (2) reading and mathematics in Grades 6-8. A school district program supported by the Intensive Summer Pilot Program grant must provide at least four weeks of rigorous instruction and be designed and implemented in partnership with an institution of higher education.

In accordance with the TEC, §29.098, adopted new 19 TAC Chapter 102, Educational Programs, Subchapter EE, Commissioner's Rules Concerning Pilot Programs, §102.1054, Intensive Summer Pilot Program, establishes and addresses provisions for: (1) applicable definitions, (2) eligibility criteria and application requirements, (3) notification of a grant award, (4) program funding and use of funds, (5) conditions of program operation, (6) program evaluation, and (7) revocation and recovery of funds.

At adoption, a technical correction was made in subsections (i) and (j) relating to pilot program participation as directed by TEA legal counsel. Subsection (i) relating to sanctions was deleted, and language relating to recovery of funds was clarified in subsection (j) and re-lettered as subsection (i). Recovery of funds is the appropriate sanction for state grant compliance and not the performance-based sanctions under the TEC, Chapter 39.

Approved pilot program participants are required to adhere to all procedural, reporting, and evaluation requirements.

The TEA determined that the adopted new section will have no direct adverse economic impact for small businesses or microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal began April 25, 2008, and ended May 25, 2008. No public comments were received.

The new section is adopted under the Texas Education Code, §29.098, as added by House Bill 2237, 80th Texas Legislature, 2007, which authorizes the commissioners of education and higher education to establish by rule a pilot program to award grants to participating campuses to provide intensive academic instruction during the summer to students identified as being at risk of dropping out of school or college. The commissioner of education is responsible to establish rules to implement programs administered by school districts to promote high school completion and college readiness through intensive academic instruction in: (1) English language arts, mathematics, and science, and (2) reading and mathematics in Grades 6-8.

The new section implements the Texas Education Code, §29.098.

§102.1054. Intensive Summer Pilot Program.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Intensive Summer Pilot Program--A pilot program established and implemented by the Texas Education Agency (TEA) in accordance with the Texas Education Code (TEC), §29.098. The pilot program is to provide eligible school districts with financial grants to establish programs in which school districts provide intensive academic instruction during the summer to students identified as being at risk of dropping out of school. Each district awarded funds under this pilot program shall design, establish, and operate an intensive summer program in partnership with an institution of higher education and must provide intensive academic instruction in English language arts, mathematics, and science in Grades 9-12 and in reading and mathematics in Grades 6-8.

(2) School district--For the purposes of this section, the definition of school district includes an open-enrollment charter school.

(3) Shared services arrangement (SSA)--A shared services arrangement is an agreement between two or more school districts and/or education service centers that provides services for entities involved.

(b) Eligibility.

(1) In accordance with the TEC, §39.358, a school district is eligible to apply for funding under the Intensive Summer Pilot Program if the school district exhibited during each of the three preceding school years characteristics that strongly correlate with high dropout rates.

(2) Eligibility for participation in the Intensive Summer Pilot Program will be determined annually by the commissioner of education based on the latest available data and research and in accordance with the TEC, §29.098, and eligibility criteria outlined in the TEC, §39.358.

(3) An eligible school district may enter into an SSA with other eligible school districts in order to establish an Intensive Summer Pilot Program that serves students from school districts identified in the SSA.

(4) An eligible school district which submits a single grant application on behalf of itself and several other school districts participating in an SSA agrees to serve as the fiscal agent for the grant and will be held responsible for all compliance and audit recoveries.

(c) Application.

(1) An eligible school district must apply through the request for application (RFA) process to participate in the Intensive Summer Pilot Program.

(2) Eligible applicants must meet all deadlines, requirements, and guidelines outlined in the RFA.

(3) An eligible school district that applies to participate in the Intensive Summer Pilot Program must describe in its application how grant funds, in-kind contributions, and donations (including matching funds) will be allocated.

(4) An eligible school district applying as the fiscal agent for an SSA must complete and submit the required SSA form as part of the grant application.

(d) Notification. The TEA will notify each applicant in writing of its selection or non-selection for participation in the Intensive Summer Pilot Program.

(e) Program funding and use of funds.

(1) In accordance with the TEC, §29.098, programs will be funded on a per-student participant amount not to exceed $750 per student. Grant awards must be matched by not less than $250 for each participating student in other federal, state, or local funds, including donations.

(2) In accordance with the TEC, §29.098, the entire amount of a grant awarded under the Intensive Summer Pilot Program must fund the program as described in the RFA, including the description of how grant funds, in-kind contributions, and donations will be allocated. In-kind contributions may include facilities use, support services, transportation, and volunteers. Donations may include the minimum district matching contribution of not less than $250 per participating student in other federal, state, or local funds, including private donations. The district matching requirement may be met with matching funds and/or in-kind contributions.

(3) A school district participating in the Intensive Summer Pilot Program may use grant funds for other necessary costs such as implementing the optional allowable activities outlined in the program requirements section of the RFA and in the guidelines related to specific costs appendix to the RFA.

(f) Conditions of pilot program operation. Each school district operating an approved Intensive Summer Pilot Program:

(1) must operate the pilot program in accordance with the TEC, §29.098, and the requirements outlined in the RFA; and

(2) may include additional classes and activities, as outlined in the RFA, to supplement the pilot program's instructional core curriculum of mathematics, science, English language arts, and reading. Additional optional activities must be aligned with the program goals and requirements provided in the RFA.

(g) Program evaluation. Each school district operating an approved Intensive Summer Pilot Program must comply with evaluation procedures established by the commissioner as detailed in the RFA.

(h) Revocation.

(1) The commissioner may revoke participation in the Intensive Summer Pilot Program based on any of the following factors:

(A) noncompliance with requirements and assurances outlined in the RFA or the provisions of this section;

(B) lack of program success as evidenced by progress reports and program data;

(C) failure to meet performance standards specified in the RFA; or

(D) failure to provide accurate, timely, and complete information as required by the TEA to evaluate the effectiveness of the pilot program.

(2) A decision by the commissioner to revoke authorization of a grant award is final and may not be appealed.

(i) Recovery of funds. The commissioner may audit the use of grant funds and may recover funds against any state provided funds.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 11, 2008.

TRD-200803548

Cristina De La Fuente-Valadez
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Proposal publication date: April 25, 2008
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19 TAC §102.1055

The Texas Education Agency (TEA) adopts new §102.1055, concerning the Collaborative Dropout Reduction Pilot Program. The new section is adopted with changes to the proposed text as published in the April 25, 2008, issue of the *Texas Register* (33 TexReg 3372). The adopted new rule implements the requirements of the Texas Education Code (TEC), §29.096, as added by House Bill (HB) 2237, 80th Texas Legislature, 2007, which requires the commissioner of education to adopt rules to administer the Collaborative Dropout Reduction Pilot Program.

HB 2237, 80th Texas Legislature, 2007, added the TEC, §29.096, establishing the Collaborative Dropout Reduction Pilot Program for students who are at risk of dropping out of school. The commissioner of education is to establish grant application criteria for school districts and open-enrollment charter schools to collaborate with various entities to coordinate services and programs among those entities. The commissioner is also required to establish standards for local collaborative agreements.

In accordance with the TEC, §29.096, the adopted new 19 TAC Chapter 102, Educational Programs, Subchapter EE, Commissioner's Rules Concerning Pilot Programs, §102.1055, Collaborative Dropout Reduction Pilot Program, establishes and addresses provisions relating to: (1) applicable definitions; (2) application requirements for a school district to receive funding on behalf of an eligible campus for the pilot grant program, including eligibility criteria; (3) notification of a grant award; (4) local collaborative agreement requirements; (5) use of funds; (6) conditions of program operation; (7) program evaluation; and (8) revocation and recovery of funds. At adoption, a technical correction was made in subsections (j) and (k) relating to pilot program participation as directed by TEA legal counsel. Subsection (j) relating to sanctions was deleted, and language relating to recovery of funds was clarified in subsection (k) and re-lettered as subsection (j). Recovery of funds is the appropriate sanction for state grant compliance and not the performance-based sanctions under the TEC, Chapter 39.

The adopted new section creates a process through which school districts or open-enrollment charters may obtain a grant to implement a local collaborative dropout program. Approved participants in collaborative dropout reduction pilot programs are required to adhere to all procedural, reporting, and evaluation requirements.

The TEA determined that the adopted new section will have no direct adverse economic impact for small businesses or microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal began April 25, 2008, and ended May 25, 2008. Following is a summary of the public comment received and corresponding agency response regarding proposed new 19 TAC Chapter 102, Educational Programs, Subchapter EE, Commissioner's Rules Concerning Pilot Programs, §102.1055, Collaborative Dropout Reduction Pilot Program.

Comment. The director of development and grants for the Lubbock-Cooper Independent School District commented that a total community approach to dropout prevention efforts is key to meeting the educational needs of stakeholders, especially in rural and inter-city regions. The commenter indicated that such an approach would not be possible if TEA grants did not seek to include all community stakeholders. The commenter also provided a description of a regional consortium in West Texas that brings together community-based partners to address the dropout problem in the region.

Agency Response. The agency agrees. Through the Collaborative Dropout Reduction Pilot Program, the TEA has sought to provide an opportunity for local districts to partner with municipalities and local community-based organizations to establish innovative programs to reduce the dropout rate and increase the college and workforce readiness of students. No changes to the rule text were necessary in response to the comment.

The new section is adopted under the Texas Education Code, §29.096, which authorizes the commissioner of education to adopt rules as necessary to administer the Collaborative Dropout Reduction Pilot Program.

The new section implements the Texas Education Code, §29.096.

§102.1055. Collaborative Dropout Reduction Pilot Program.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Collaborative Dropout Reduction Pilot Program--A pilot program established and implemented by the Texas Education Agency (TEA) in accordance with the Texas Education Code (TEC), §29.096. The pilot program is to provide eligible school districts with financial grants to implement a local collaborative dropout reduction program. Only an eligible school district may apply for funding under this program and must serve as the fiscal agent for the pilot program. A school district awarded a grant under this pilot program shall coordinate the delivery of research-based intervention services and programs among local entities such as local businesses, local government or law enforcement agencies, nonprofit organizations, faith-based organizations, and institutions of higher education to comprehensively reduce the dropout rate in the community and to increase the job skills, employment opportunities, and continuing education opportunities of students who might otherwise have dropped out of school.

(2) Collaborative partner--A collaborative partner is a public or private entity which participates in a Collaborative Dropout Reduction Pilot Program and contributes to collaborative efforts through the provision of funds, services, personnel, and/or in other ways deemed appropriate to assist in reaching program goals. Collaborative partners may include, but are not limited to, entities such as school districts, local businesses, other local governments or law enforcement agencies, nonprofit organizations, faith-based organizations, and institutions of higher education.

(3) Lead educational staff member--A person working as part of the Collaborative Dropout Reduction Pilot Program that is responsible for program coordination, outreach, recruitment, and other activities necessary to implement and manage the program. The lead educational staff member may be a full- or part-time paid staff person, or the position may be filled by a volunteer. The lead educational staff

member may be an employee of the district awarded a grant under this program, or an employee/volunteer from one of the partners in the local collaborative.

(4) Outreach--Activities designed to raise awareness and provide information, solicit participation and/or contributions, recruit students and other stakeholders, and involve the local community in collaborative initiatives.

(5) School district--For the purposes of this section, the definition of school district includes an open-enrollment charter school.

(6) Shared services arrangement (SSA)--A shared services arrangement is an agreement between two or more school districts and/or education service centers that provides services for entities involved.

(b) Eligibility.

(1) In accordance with the TEC, §39.358, a school district is eligible to apply for funding under the Collaborative Dropout Reduction Pilot Program if the district exhibited during each of the three preceding school years characteristics that strongly correlate with high dropout rates.

(2) Eligibility for participation in the Collaborative Dropout Reduction Pilot Program will be determined annually by the commissioner of education based on the latest available data and research and in accordance with the TEC, §29.096, and eligibility criteria outlined in the TEC, §39.358.

(3) An eligible school district may enter into an SSA in order to apply for grant funds. An SSA is limited to no more than ten eligible districts. A school district may submit or be a member of an SSA for no more than one Collaborative Dropout Reduction Pilot Program grant application. A collaborative partner, other than a school district, may be included in more than one SSA.

(4) An education service center (ESC) established under the TEC, §8.001, is not eligible to apply as a fiscal agent for an SSA but may be a collaborative partner with eligible districts.

(5) An eligible school district which submits a single grant application on behalf of itself and several other school districts participating in an SSA agrees to serve as the fiscal agent for the grant and will be held responsible for all compliance and audit recoveries.

(c) Application.

(1) An eligible school district must apply through the request for application (RFA) process to participate in the Collaborative Dropout Reduction Pilot Program.

(2) Eligible applicants must meet all deadlines, requirements, and guidelines outlined in the RFA.

(3) An eligible school districts that applies to participate in the pilot program must identify and include in its application:

(A) the source(s) of matching funds from the participating collaborating partners as specified in the grant application; and

(B) a description of how the program will be sustained beyond the life of the grant funding.

(d) Notification. The TEA will notify each applicant in writing of its selection or non-selection for participation in the Collaborative Dropout Reduction Pilot Program.

(e) Local collaborative agreement.

(1) Each eligible school district selected to participate must submit a copy of a local collaborative agreement, such as a memorandum of understanding, to the TEA prior to implementation of the pilot program.

(2) The local collaborative agreement must include the minimum standards specified in the TEC, §29.096(e), and a detailed description of the following:

(A) the source(s) of matching funds;

(B) how matching funds will be used by the pilot program;

(C) a description of the services, activities, commitments, assurances, responsibilities, obligations, and understandings of each collaborative partner; and

(D) decision-making procedures between the school district and collaborative partner(s).

(f) Use of funds.

(1) In accordance with the TEC, §29.096, the entire amount of a grant awarded under the Collaborative Dropout Reduction Pilot Program must fund programs in adherence with guidelines and requirements provided in the RFA.

(2) A school district participating in the Collaborative Dropout Reduction Pilot Program may allocate no more than 15% of total project funds, which include the state grant award and local match, for administrative expenses. Of the amount used for administrative costs, no more than 5.0% may be state grant award funds. Up to an additional 10% may be matching funds, but in no case can administrative costs exceed 15% of the total project funds. A school district may use in-kind contributions for administrative expenses. In-kind contributions may include the use of facilities, office space, and equipment and the provision of administrative services and supplies.

(3) Allowable costs include, but are not limited to:

(A) costs associated with implementing the local Collaborative Dropout Reduction Program in the following four service areas: workforce skill development, academic support, attendance improvement, and student and family support services; and

(B) costs associated with a designated lead educational staff member to conduct outreach activities designed to identify and involve eligible students as well as public and private entities to participate in the program.

(g) Conditions of pilot program operation. Each school district operating an approved Collaborative Dropout Reduction Pilot Program must operate the program in accordance with the TEC, §29.096, and the requirements outlined in the RFA and must:

(1) coordinate the delivery of research-based intervention services and programs among local entities such as local businesses, local government or law enforcement agencies, nonprofit organizations, faith-based organizations, and institutions of higher education to comprehensively reduce the dropout rate in the community and to increase the job skills, employment opportunities, and continuing education opportunities of students who might otherwise have dropped out of school;

(2) serve students in Grades 9, 10, 11, and 12 or any combination thereof;

(3) comply with all deadlines, requirements, and assurances established in the RFA;

(4) provide services in the areas of workforce development, academic support, student and family support services, and attendance improvement;

(5) serve a minimum of students (as specified in the grant application) per grant period; and

(6) designate governance responsibilities to a school district official for the purposes of managing the implementation and operation of the pilot program.

(h) Program evaluation. Each school district operating an approved Collaborative Dropout Reduction Pilot Program must comply with evaluation procedures established by the commissioner as detailed in the RFA.

(i) Revocation.

(1) The commissioner may revoke participation in a Collaborative Dropout Reduction Pilot Program and require the school district that received an award to repay some or all of the grant award based on any of the following factors:

(A) noncompliance with requirements and assurances outlined in the RFA and/or the provisions of this section and the TEC, §29.096;

(B) failure to meet performance measures specified in the RFA; or

(C) failure to provide accurate, timely, and complete information as required by the TEA to evaluate the effectiveness of the pilot program.

(2) A decision by the commissioner to revoke authorization of a grant award is final and may not be appealed.

(j) Recovery of funds. The commissioner may audit the use of grant funds and may recover funds against any state provided funds.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 11, 2008.

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CHAPTER 109. BUDGETING, ACCOUNTING, AND AUDITING
SUBCHAPTER C. ADOPTIONS BY REFERENCE

19 TAC §109.41

The Texas Education Agency (TEA) adopts an amendment to §109.41, concerning the *Financial Accountability System Resource Guide.* The amendment is adopted with changes to the proposed text as published in the April 18, 2008, issue of the *Texas Register* (33 TexReg 3114).

Section 109.41 adopts by reference the *Financial Accountability System Resource Guide* as the TEA's official rule. The *Resource Guide* describes rules for financial accounting in modules for financial accountability and reporting, budgeting, purchasing, auditing, site-based decision making, accountability, data collection and reporting, management, and state compensatory education. The *Resource Guide* also includes a special supplement module for nonprofit charter school chart of accounts. Public school districts use the *Resource Guide* to meet the accounting, auditing, budgeting, and reporting requirements as set forth in the Texas Education Code and other state statutes relating to public school finance. Under §109.41(b), the commissioner of education shall amend the *Resource Guide,* adopting it by reference, as needed. The *Resource Guide* is available at http://www.tea.state.tx.us/school.finance/ on the TEA website.

The adopted amendment to §109.41 references the *Resource Guide* dated June 2008. The amendment includes updates to the state compensatory education module and the accounting and auditing modules to reflect new accounting and auditing rules and standards. Part of the update includes the addition of new account codes and the deletion of some account codes. The charter school supplement has also been updated to reflect these changes in accounting and auditing rules and standards. In addition, the charter school supplement has been updated to address provisions for recovering over-allocated funds as a result of an audit adjustment.

The rule text of §109.41 was modified since published as proposed to reflect June 2008 as the date of the *Resource Guide* since changes were made subsequent to the April 2008 proposal.

In response to public comments, the following changes are made to the *Resource Guide* at adoption.

Module 1 has been updated to align language related to the technology coordinator for instructional networks in Section 1.4.3 - Function Codes; amend language related to the collection of taxes in Section 1.4.3 - Function Codes; and provide clarification on coding for substitutes in Section 1.4.9 - Expenditure/Expense Object Codes.

Appendix 7 has been modified to clarify the procedures for recording accounting entries in Illustration #1 and investment income codes for realized and unrealized market changes in Illustration #1.

The TEA determined that the adopted amendment will have no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal began April 18, 2008, and ended May 18, 2008. Following is a summary of public comments and corresponding agency responses regarding proposed amendment to 19 TAC Chapter 109, Budgeting, Accounting, and Auditing, Subchapter C, Adoptions By Reference, §109.41, Financial Accountability System Resource Guide.

Comment. Concerning Module 1, Section 1.4.3 - Function Codes, the executive director of budget and finance at Whitehouse Independent School District (ISD) commented that the "Include" column for Function 13 regarding costs related to the technology coordinator for instructional networks was not in agreement with the "Exclude" column for Function 12, which noted that the technology coordinator for instructional networks should be included in Function 11.

Agency Response. The agency agrees and has moved the technology coordinator from the "Include" column to the "Exclude" column for Function 13 and added the technology coordinator to the "Include" column for Function 11. The change can be found in the *Resource Guide* adopted by reference in §109.41.

Comment. Concerning Module 1, Section 1.4.3 - Function Codes, the business manager at Hooks ISD commented that the "Exclude" column for Function 41 regarding costs related to the appraisal of property was not in agreement with the "Include" column for Function 99, which includes only the appraisal of property and not the collection of taxes.

Agency Response. The agency agrees and has deleted the language in the "Exclude" column for Function 41 related to the collection of taxes. The change can be found in the *Resource Guide* adopted by reference in §109.41.

Comment. Concerning Module 1, Section 1.4.9 - Expenditure/Expense Object Codes, a consultant with Statewide Educational Consulting & Counseling Associates, Inc. commented that object code 6112 included a reference to salaries or wages for substitute teachers and other professionals being used primarily with Function 13 and Function 11.

Agency Response. The agency agrees and has clarified the language to indicate that substitutes are coded to the function of the professional being replaced. The change can be found in the *Resource Guide* adopted by reference in §109.41.

Comment. Concerning Appendix 7 - Example Accounting Entries - Market Changes in Investments, the treasurer at Houston ISD commented that within the first paragraph of Illustration #1, the first sentence states that accounting entries under Governmental Accounting Standards Board (GASB) 31 are ". . . (to be recorded at least quarterly). . . ." The commenter stated that entries under GASB 31 must be recorded at least annually on the financial statements. The commenter also stated that the Public Funds Investment Act requires that changes in Fair Value be reported at least quarterly. The commenter added that the distinction between recorded and reported should be noted, and that school districts can record the entries more frequently than annually if they so desire but are not required to do so.

Agency Response. The agency agrees and has updated the language in Illustration #1 to note that school districts may record accounting entries more frequently than annually. The change can be found in the *Resource Guide* adopted by reference in §109.41.

Comment. Concerning Appendix 7 - Example Accounting Entries - Market Changes in Investments, the treasurer at Houston ISD commented that the third sentence of the first paragraph in Illustration #1 states that, ". . .separate investment income codes need to be used to record realized and unrealized (market) changes (gain and losses)." The commenter noted that according to the Government Finance Officers Association publication *Governmental Accounting, Auditing, and Financial Reporting,* ". . . governments are not permitted to distinguish realized gains and losses from unrealized gains and losses on the face of the financial statements." The commenter stated that Generally Accepted Accounting Principles does permit governments to disclose information on realized gains and losses in the footnotes to the financial statements if certain additional interpretive information is included. The commenter concluded that separate investment income codes may be used but are not required.

Agency Response. The agency agrees and has updated the language in Illustration #1 to specify that separate investment income codes may be used to record realized and unrealized market changes in separate accounts. The change can be found in the *Resource Guide* adopted by reference in §109.41.

The amendment is adopted under the Texas Education Code, §§7.055, 7.102(c)(32), 44.001, 44.007, and 44.008, which authorize the commissioner of education to establish advisory guidelines relating to fiscal management of a school district and the State Board of Education to establish a standard school fiscal accounting system in conformity with generally accepted accounting principles.

The adopted amendment implements the Texas Education Code, §§7.055, 7.102(c)(32), 44.001, 44.007, and 44.008.

§109.41. Financial Accountability System Resource Guide.

(a) The rules for financial accounting are described in the official Texas Education Agency publication, Financial Accountability System Resource Guide, dated June 2008, which is adopted by this reference as the agency's official rule. A copy is available for examination during regular office hours, 8:00 a.m. to 5:00 p.m., except holidays, Saturdays, and Sundays, at the Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

(b) The commissioner of education shall amend the Financial Accountability System Resource Guide and this section adopting it by reference, as needed. The commissioner shall inform the State Board of Education of the intent to amend the Resource Guide and of the effect of proposed amendments before submitting them to the Office of the Secretary of State as proposed rule changes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 11, 2008.

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Cristina De La Fuente-Valadez
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Texas Education Agency
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For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

22 TAC §217.20

The Texas Board of Nursing (BON) adopts without changes an amendment to 22 Texas Administrative Code §217.20 (Safe Harbor Peer Review), which was proposed and published in the June 6, 2008, issue of the *Texas Register* (33 TexReg 4449).

The adopted amendment to §217.20 corrects the name of the title to this section. When the rule was originally adopted and published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3632), the title was "Safe Harbor Peer Review," but it

should have been "Safe Harbor Peer Review for Nurses and Whistleblower Protections."

No comments were received regarding adoption of this amendment.

The adoption is pursuant to the authority of Texas Occupations Code, §301.151 and §301.152, which authorize the BON to adopt, enforce, and repeal rules consistent with its statutory authority under the Nursing Practice Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 9, 2008.

TRD-200803531
James W. Johnston
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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 106. PERMITS BY RULE

The Texas Commission on Environmental Quality (commission or TCEQ) adopts the repeal of §§106.142, 106.147, and 106.223 as published in the February 15, 2008, issue of the *Texas Register* (33 TexReg 1235) *without changes*.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

This rulemaking repeals the permits by rule (PBRs) for rock crushers, asphalt concrete plants, and sawmills, which are in §§106.142, 106.147, and 106.223, respectively. The Air Permits Division has developed new standard permits for permanent rock crushers, asphalt concrete plants, and sawmills. These standard permits update administrative and technical requirements for these facilities and are intended to replace the PBRs that will be repealed.

SECTION BY SECTION DISCUSSION

Subchapter E: Aggregate and Pavement

§106.142 - Rock Crushers

This rulemaking repeals the PBR for rock crushers. The TCEQ has developed a new standard permit for rock crushers that has provisions regarding public notice, property line distance limitations, operating hours, throughput limitations, monitoring, and recordkeeping. This standard permit was the subject of an extensive protectiveness review based on air dispersion modeling to help ensure that no adverse off-property impacts or nuisance conditions occur. Additionally, the rock crusher standard permit has conditions to help eliminate: use of the standard permit as an immediate precursor for a new source review (NSR) permit; circumvention of public notice for sites applying for an NSR permit; and stacking of facilities at a single site. A facility that is currently authorized under the PBR can remain so until it is moved or modified.

§106.147 - Asphalt Concrete Plants

This rulemaking repeals the PBR for asphalt concrete plants. The TCEQ has issued a new standard permit for hot mix asphalt plants that is available for use in lieu of the PBR. This standard permit includes requirements to minimize dust emissions, property line distance limitations, and opacity and visible emission limitations. These limitations were based on air dispersion modeling, impacts analyses, and plant observations performed to verify the protectiveness of the standard permit. The commission has concluded research that shows that the standard permit is protective of the public health and welfare and facilities that operate under the conditions specified will comply with TCEQ regulations. The PBR for asphalt concrete plants has been unavailable for use since November of 2003. A facility that is currently authorized under the PBR can remain so until it is moved or modified.

Subchapter I: Manufacturing

§106.223 - Saw Mills

This rulemaking repeals the PBR for sawmills. The TCEQ has issued a new standard permit for sawmills that is available for use in lieu of the PBR. The new standard permit for sawmills provides an expedited preconstruction authorization process that may be used for any sawmill complying with the standard permit requirements. The PBR for sawmills has not proven to be a widely useful authorization because it lacks any provision for drying lumber, which is a common practice at most sawmills. The new standard permit authorizes lumber drying in kilns that are directly heated or indirectly heated by a small boiler. Additionally, the new standard permit provides an authorization for an internal combustion engine used for electric power generation. A facility that is currently authorized under the PBR can remain so until it is moved or modified. However, owners or operators currently authorized by the PBR may want to reauthorize the facility under the new standard permit, since it includes provisions for drying lumber and generation of electricity.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted repeals in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that this adoption is not subject to §2001.0225 because it does not meet the definition of a major environmental rule as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adoption is not a major environmental rule because it is mainly an administrative action only, to repeal the PBRs for rock crushers, asphalt concrete plants, and sawmills, which are in §§106.142, 106.147, and 106.223. The adopted repeals will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

In addition, a regulatory impact analysis is not required because the adopted repeals do not meet any of the four applicability criteria for requiring a regulatory impact analysis of a major environmental rule as defined in the Texas Government Code. Texas

Government Code, §2001.0225 applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This adoption does not exceed a standard set by federal law. In addition, this adoption does not exceed an express requirement of state law and is not adopted solely under the general powers of the agency, but is specifically authorized by the provisions cited in the STATUTORY AUTHORITY section of this preamble. Finally, this adoption does not exceed a requirement of a delegation agreement or contract to implement a state and federal program.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this repeal action and performed an analysis of whether the repeals are subject to Texas Government Code, Chapter 2007. The primary purpose of the repeals is to repeal the PBRs for rock crushers, asphalt concrete plants, and sawmills, which are in §§106.142, 106.147, and 106.223. These repeals do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Promulgation and enforcement of these repeals is neither a statutory nor a constitutional taking because they do not affect private real property. Therefore, these repeals do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.), and commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed repeals will indirectly benefit the environment because repealing the PBRs is expected to result in more standard permit registrations, and standard permits help ensure these types of facilities will have fewer adverse impacts to public health and the environment. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Most facilities affected by this rule change are minor sources and not subject to the Federal Operating Permits Program. However, if a facility authorized by §§106.142, 106.147, or 106.223 is located at a site with a federal operating permit, any modification of the facility that would require a new authorization would also require revision of the operating permit to reflect the new authorization.

PUBLIC COMMENT

A public hearing on this proposal was offered on March 18, 2008, at 10:00 a.m. at the Texas Commission on Environmental Quality complex, located at 12100 Park 35 Circle in Austin, however no oral comments were provided at the hearing. A public comment period was offered from February 15, 2008 to March 21, 2008. No comments were received.

RESPONSE TO COMMENTS

No comments were received.

SUBCHAPTER E. AGGREGATE AND PAVEMENT

30 TAC §106.142, §106.147

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the Texas Water Code; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeals are also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The repeals are also adopted under THSC, §382.051, concerning Permitting Authority of Commission; Rules, that authorizes the commission to issue permits and adopt rules necessary for permits issued under THSC, Chapter 382; §382.05196, concerning Permits by Rule, which authorizes the commission to adopt permits by rule for types of facilities which will not make a significant contribution of air contaminants to the atmosphere; and §382.057, concerning Exemption, which authorizes the commission to exempt from permitting changes within any facility which will not make a significant contribution of air contaminants to the atmosphere.

The adopted repeals implement THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05196, and 382.057.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 11, 2008.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 31, 2008
Proposal publication date: February 15, 2008
For further information, please call: (512) 239-0177

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SUBCHAPTER I. MANUFACTURING

30 TAC §106.223

STATUTORY AUTHORITY

The repeal is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the Texas Water Code; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeal is also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The repeal is also adopted under THSC, §382.051, concerning Permitting Authority of Commission; Rules, that authorizes the commission to issue permits and adopt rules necessary for permits issued under THSC, Chapter 382; §382.05196, concerning Permits by Rule, which authorizes the commission to adopt permits by rule for types of facilities which will not make a significant contribution of air contaminants to the atmosphere; and §382.057, concerning Exemption, which authorizes the commission to exempt from permitting changes within any facility which will not make a significant contribution of air contaminants to the atmosphere.

The adopted repeal implements THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05196, and 382.057.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 230. GROUNDWATER AVAILABILITY CERTIFICATION FOR PLATTING

30 TAC §§230.1 - 230.3, 230.9

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §§230.1 - 230.3 and 230.9 *without changes* to the proposed text as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1744) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the adopted amendments is to implement Senate Bill (SB) 662, 80th Texas Legislature, 2007, by requiring certain plat applicants to transmit to the Texas Water Development Board (TWDB) and any applicable groundwater conservation district (GCD) information that would be useful in performing GCD activities, conducting regional water planning, maintaining the TWDB's groundwater database, or conducting state studies on groundwater. Under Local Government Code, §212.0101 and §232.0032, a municipal authority responsible for approving plats by ordinance or the commissioners court of a county by order (respectively) may require a person who submits a plat application for the subdivision of a tract of land for which the source of the water supply intended for the subdivision is groundwater under that land, to have attached to it a statement that is prepared by an engineer licensed to practice in this state or a geoscientist licensed to practice in this state and certifies that adequate groundwater is available for the subdivision.

Local Government Code, §212.0101(b) and §232.0032(b) both require the commission, by rule, to establish the appropriate form and content of a certification to be attached to a plat application. Local Government Code, §212.0101(c) and §232.0032(c), both added by SB 662, require the commission, in consultation with the TWDB, by rule, to require a person who submits a plat to transmit the information to the TWDB and any applicable GCD. SB 662 became effective on September 1, 2007, and requires the commission's rules be adopted before January 1, 2009.

If the use of Chapter 230, Groundwater Availability Certification for Platting, is required by a municipal or county platting authority, plat applicants must provide the Certification of Groundwater Availability for Platting form under §230.3(c) to the municipal or county platting authority. Plat applicants must provide the information, estimates, data, calculations, and determinations required to support the certification to the municipal or county platting authority upon request. Plat applicants are not presently required to provide this information to the commission, the TWDB, or to any applicable GCD. The adopted amendments will require these plat applicants to transmit the data to the TWDB and applicable GCDs. The data will be used for groundwater management evaluation and planning purposes required by Texas Water Code (TWC), Chapter 16 for the TWDB, and TWC, Chapter 36, for the GCDs.

SECTION BY SECTION DISCUSSION

Adopted amendments to §230.1, Applicability, make a conforming citation change and add requirements for plat applicants to transmit information to the executive administrator of the TWDB and any applicable GCD, as added by SB 662, 80th Legislature, 2007. The adopted amendment in subsection (a) changes and conforms the reference from Local Government Code,

§232.0031 to §232.0032. The adopted amendments add new subsection (c), concerning transmittal of data, to provide the requirements for plat applicants to transmit information to the executive administrator of the TWDB and the applicable GCD or GCDs. If use of Chapter 230 is required by the municipal or county platting authority, adopted subsection (c) requires the plat applicant to: provide copies of the information, estimates, data, calculations, determinations, statements, and the certification described in Chapter 230 to determine groundwater quality, availability, and usability to the executive administrator of the TWDB and the applicable GCDs; and, attest that copies of this information have been provided. The adopted amendments add new Figure: 30 TAC §230.1(c)(2), Transmittal of Data. This form will be used and signed by the plat applicant to attest that copies of information have been transmitted as required by the Local Government Code and Chapter 230. The executive director is allowed to make minor changes to this form which do not conflict with the requirements of the chapter. The commission adopts these amendments to implement Local Government Code, §212.0101(c) and §232.0032(c), as added by SB 662, 80th Legislature, 2007.

Adopted amendment to §230.2, Definitions, adds two new definitions and moves the term "plat applicant" into alphabetical order in the list of definitions. The definition for "applicable groundwater conservation district or districts" is added as new paragraph (1). An applicable GCD would be defined as any district or authority created under Texas Constitution, Article III, Section 52, or Article XVI, Section 59, that has the authority to regulate the spacing of water wells, the production from water wells, or both, and which includes within its boundary any part of the plat applicant's adopted subdivision. The definition for "executive administrator" is added as new paragraph (6) to mean the executive administrator of the TWDB. The commission adopts these definitions to implement Local Government Code, §212.0101(c) and §232.0032(c), as added by SB 662, 80th Legislature, 2007. The commission also moves the term "plat applicant" from paragraph (7) to paragraph (10) so that the list of terms in §230.2 is in alphabetical order.

Adopted amendments to §230.3, Certification of Groundwater Availability for Platting, adds the requirement for plat applicants to provide a copy of the Certification of Groundwater Availability for Platting form to the executive administrator of the TWDB and to any applicable GCD, and updates Figure: 30 TAC §230.3(c). This adopted amendment to subsection (b) requires these plat applicants to transmit the certification form to the TWDB and applicable GCDs to use for the groundwater management evaluation and planning purposes required by TWC, Chapters 16 and 36. The first adopted amendment to Figure: 30 TAC §230.3(c) is limited to a conforming statutory citation change on the second line of the "Use of this form" notation. This adopted amendment changes and conforms the reference from Local Government Code, §232.0031 to §232.0032. The second adopted amendment to Figure: 30 TAC §230.3(c) updates the "note" on line 18 by referring users to the most recent State Water Plan for general information on the state's aquifers. The commission adopts this change because the TWDB has added an aquifer and changed aquifer boundaries since the previously referenced report was published in 1995. The commission adopts these amendments to implement Local Government Code, §212.0101(c) and §232.0032(c), as added by SB 662, 80th Legislature, 2007.

Adopted amendment to §230.9, Determination of Groundwater Quality, updates paragraph (3) to reflect the change in state authority for laboratory accreditation and certification from the Texas Department of Health to the TCEQ as part of House Bill 2912, 77th Legislature, 2001. The conforming change in the adopted amendment to paragraph (3) removes the reference to the Texas Department of Health and provides cross references to commission laboratory accreditation and certification rules in 30 TAC Chapter 25, Environmental Testing Laboratory Accreditation and Certification.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Administrative Procedure Act. A "major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not the specific intent of this rule to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the adopted rulemaking is to implement legislative changes enacted by SB 662, which require certain plat applicants to transmit to the TWDB and any applicable GCD information that would be useful in performing GCD activities, conducting regional water planning, maintaining the TWDB's groundwater database, or conducting studies for the state related to groundwater.

Further, the rulemaking does not meet the statutory definition of a "major environmental rule" because the adopted amendments will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The cost of complying with the adopted amendments is not expected to be significant with respect to the economy as a whole or a sector of the economy, particularly if the plat applicant submits the information electronically. In addition, the adopted amendments could provide a financial benefit to local GCDs, in that the GCDs would receive the plat applicants' data, which would save the time and money required for conducting groundwater availability studies.

Furthermore, the adopted rulemaking does not meet the statutory definition of a "major environmental rule" because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). This section only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The adopted rulemaking does not meet the four applicability requirements, because the adopted rules: 1) do not exceed a standard set by federal law as there is no federal equivalent for the provisions in the Texas Local Government Code; 2) are specifically required by state law, specifically Local Government Code, §212.0101 and §232.0032 and do not exceed the express requirements of these statutes;

3) do not exceed a requirement of federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program as no such federal delegation agreement exists with regard to the adopted rules; and 4) are not an adoption of a rule solely under the general powers of the commission as the adopted rules are required by SB 662.

The commission invited public comment of the draft regulatory impact analysis determination. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted amendments and performed an assessment of whether the adopted amendment constitutes a taking under Texas Government Code, Chapter 2007. The primary purpose of the adopted rulemaking is to implement legislative changes enacted by SB 662, which require certain plat applicants to transmit to the TWDB and any applicable GCD information that would be useful in performing GCD activities, conducting regional water planning, maintaining the TWDB's groundwater database, or conducting studies for the state related to groundwater. The adopted amendments would substantially advance this purpose by amending the Chapter 230 rules to incorporate the new statutory requirements.

Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted regulations do not affect a landowner's rights in private real property because this rulemaking does not relate to or have any impact on an owner's rights to property, nor does the adopted rulemaking reduce the value of property by 25% or more beyond that which would otherwise exist in the absence of the regulations. The adopted amendments will only affect plat applicants who are already required by the county platting authority or municipality to certify that sufficient groundwater is available as the intended water supply. The plat applicants would be required to submit information useful in performing GCD activities, conducting regional water planning, maintaining the state's groundwater database, or conducting studies for the state related to groundwater to the applicable GCD and the executive administrator of the TWDB. Therefore, the adopted rulemaking would not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

The commission invited public comment of the consistency of this rulemaking with the coastal management program during this public comment period. No comments were received regarding the consistency of this rulemaking with the coastal management program.

PUBLIC COMMENT

The commission held a public hearing for this rule on March 27, 2008 in Austin, Texas. The public comment period for this rulemaking closed on March 31, 2008. The commission received comments from Naismith Engineering, Inc. (NEI).

NEI generally supported the proposed rules and suggested specific modifications to the proposed rules as stated in the RESPONSE TO COMMENTS section of this preamble.

RESPONSE TO COMMENTS

NEI states that the existing rule language seems to apply when groundwater is the sole source of water supply and recommends broadening the rule to include groundwater supply supplemented with other sources such as surface water or rainwater. Specifically, in §230.1(a), NEI recommends that the phrase 'he source of the water supply' be replaced by the phrase 'any portion of the source of water supply' in two instances.

The commission disagrees with this comment and notes that the language in §230.1(a) mirrors the statutory language in Local Government Code, §212.0101(a) and §232.0032(a). Further, plat applicants are required by §230.4(5) to provide information pertaining to the anticipated method of water distribution to the proposed lots in the proposed subdivision, which covers a combination of distribution methods. Lastly, the rules provide that the municipal or county authority may require any additional information to support the plat application. Additional information may include the identification of any other source of water supply planned for use in the proposed subdivision. The commission has made no changes in response to this comment.

NEI states that the current regulations use the term 'municipal or county authority' to designate the entity responsible for review and approval of plats and recommends broadening the range of entities authorized to receive plat submittals in Local Government Code, §242.001(d)(4)(A). Local Government Code, §242.001(d)(4)(A) provides that subdivisions within a county and within the extra-territorial jurisdiction of a municipality may also be reviewed and issued approvals by 'one office.' Specifically, NEI requests that §230.2, Definitions, include a definition for 'Platting Authority' as follows: 'A municipality, county, or single office established under an inter-local agreement between one or more municipalities and one or more counties pursuant to TLGC §242.001(d)(4); any of which is exercising authority granted for the review and approval of subdivision plats under the TLGC.'

The commission disagrees with this comment and notes that the term 'municipal or county authority' is derived from the language in Local Government Code, §212.0101(a) and §232.0032(a) and used throughout Chapter 230 to identify the platting authorities. Adding the commenter's proposed definition of platting authority would make the rules inconsistent throughout Chapter 230, as well as inconsistent with the statutory authority in the Local Government Code. Furthermore, the municipal or county platting authorities will be aware of any inter-local agreements into which they have entered and can provide specific instructions for plat applicants as necessary, if such an agreement applies to a proposed subdivision. The commission has made no changes in response to this comment.

NEI requests that the Form in §230.3(c) be modified to require the plat applicant and the Texas licensed professional engineer or geoscientist to provide geographic coordinates for proposed subdivision and test data locations. NEI also recommends amending §230.3(c) to provide for the electronic submittal of required information to the executive administrator of the TWDB and the applicable GCD.

The commission agrees that the use of geographic information systems and digital information simplifies data exchange and reporting and also notes that most Texas licensed professional en-

gineers and geoscientists will use this type of information while addressing Chapter 230 rule requirements. However, the commission does not agree with amending the Form in §230.3(c) or §230.3(c) to require submission of electronic data to the executive administrator of the TWDB or the applicable GCD. The submission of electronic data, including geographic and digital information to these entities, should be governed by their rules or stated policies and not by the rules of the commission. The commission made no change in response to this comment.

NEI comments that platting authorities already have authority to request submittal of applicable groundwater quality information in the Local Government Code. NEI requests that the language in §230.9(b) reflect the established authority of platting authorities rather than state that the groundwater quality information be "made available" to the platting authority. NEI also suggests that the recurring subsections throughout Chapter 230 should be relocated to §230.1(c) to instruct plat applicants to 'provide any or all of the information required by this Chapter to the platting authority in accordance with the platting authority's established rules, orders, ordinances, and submittal procedures.'

The commission disagrees with this comment. Local Government Code, §212.0101(c) and §232.0032(c) require that plat applicants provide pertinent information to the executive administrator of the TWDB and the applicable GCD, should use of Chapter 230 be required by the municipal or county authority; however, the statute does not similarly mandate the dissemination of the pertinent information to the municipal or county platting authority. The commission has structured Chapter 230 to allow the municipal or county platting authorities to exercise their permissive authority without state interference or mandate. Additionally, §230.1(c) delineates the groundwater data to submit to the TWDB and applicable GCD at the outset and is applicable to the remainder of the chapter. The recurring subsections on Submission of Information will remain for each subsection where information is required, but §230.1(c) will delineate the details of such a submittal. The commission did not change the rule in response to this comment.

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103 and §5.105, which provide the commission with authority to adopt rules; and specific statutory authorization is derived from Local Government Code, §212.0101(b) and §232.0032(b), which require the commission to promulgate rules that establish the appropriate form and content of a certification to be attached to a plat application; and as added by Senate Bill 662, Local Government Code, §212.0101(c) and §232.0032(c), which require the commission, in concert with the Texas Water Development Board (TWDB), to promulgate rules requiring a plat applicant to transmit the information to the TWDB and any applicable GCD.

The adopted amendments implement Local Government Code, §212.0101(c) and §232.0032(c).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

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CHAPTER 293. WATER DISTRICTS

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §§293.11, 293.32, 293.41, 293.63, 293.201, and 293.202. Sections 293.11 and 293.32 are adopted *without changes* as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1749) and will not be republished. Sections 293.41, 293.63, 293.201, and 293.202 are adopted *with changes* to the proposed text.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The commission has the statutory responsibility to create, supervise and dissolve certain water and water-related districts and to review the sale and issuance of bonds for district improvements in accordance with Texas Water Code (TWC), Chapters 12 and 49 - 67. Additionally, commission oversight of district bonds may include review of compliance with bidding procedures allowed by Local Government Code, Chapter 271. The commission oversees approximately 1,300 active and approximately 500 inactive water districts in Texas. Chapter 293 of the commission's rules governs the creation, supervision, and dissolution of all general and special law districts and the conversion of certain districts. Chapter 293 also governs the commission's review of bond applications by districts relating to engineering standards and economic feasibility of district construction project design and completion.

During the 80th Legislative Session, 2007, House Bills (HBs) 576, 1127, 1886, 2984, 3378, 3770, and Senate Bill (SB) 657 were passed which amended TWC, Chapters 49, 53, and 54, and Local Government Code, Chapter 271. The adopted rulemaking would establish new requirements or revise existing requirements relating to the administration of water districts and the commission's supervision over districts' actions.

HB 576, 80th Legislative Session, 2007, amends TWC, §49.271(c) to require that a district must accept a bid bond as a bid deposit if a contract is over $250,000.

HB 1127, 80th Legislative Session, 2007, amends TWC, §49.4645(a) to allow districts that are outside of a planned community of at least 15,000 acres and within Montgomery County to issue bonds supported by taxes to fund recreational facilities.

HB 1886, 80th Legislative Session, 2007, amends Local Government Code, Chapter 271 to add Subchapter J to allow a local governmental entity, as defined in the bill, limited use of a design-build process to construct defined civil works projects.

HB 2984, 80th Legislative Session, 2007, amends TWC, §53.063 to revise the qualifications to be a supervisor on a board of a Fresh Water Supply District (FWSD), except for an FWSD located wholly or partly in Denton County.

HB 3378, 80th Legislative Session, 2007, amends TWC, §54.016 to add subsections (i) and (j) to allow a city with a certain population, when consenting to the creation of a district

or annexation of land by a district, to require that a district's water system meets the fire flow requirements adopted by the city.

HB 3770, 80th Legislative Session, 2007, amends TWC, §54.234 to: allow a petitioner seeking creation of a municipal utility district (MUD) to also request road powers at the time of creation; delete the requirement to have taxing authority before acquiring road powers; delete the requirement for preliminary plan approval by the Texas Transportation Commission; and define the types of roads that can be acquired, constructed, and financed by a MUD, and conveyed to a municipality, county, or state for operation and maintenance.

SB 657, 80th Legislative Session, 2007, amends: TWC, §49.271(c) to increase from $25,000 to $50,000 the threshold for which a bidder is required to submit a security deposit; TWC, §49.273(d), (e), and (f) to increase thresholds from $25,000 to $50,000 for the requirement to advertise and from $15,000 to $25,000 for the requirement to solicit at least three competitive bids; and TWC, §49.273 to add subsection (m) to allow the board of a special law district to elect to contract in accordance with TWC, §49.273, even if it conflicts with provisions in the district's special law.

SECTION BY SECTION DISCUSSION

§293.11. Information Required to Accompany Applications for Creation of Districts.

The commission adopts §293.11(a)(3)(B) to reflect that a city, in consenting to the creation of a district, may impose a restriction requiring that a district's system meet fire flow requirements. The commission adopts this change to implement TWC, §54.016(i), as added by HB 3378, 80th Legislative Session, 2007. The change made by HB 3378, 80th Legislative Session, 2007, to add TWC, §54.016(i) applies to a city with a population of 500,000 or more, located within a county with a population of at least 1.4 million and with the county also having two or more cities with a population of at least 300,000.

The commission adopts §293.11(d) to: add §293.11(d)(11) to reflect that a petitioner seeking creation of a MUD may also request that road powers be granted, and renumber existing §293.11(d)(11) as §293.11(d)(12). The commission adopts this change to implement TWC, §54.234, as amended by HB 3770, 80th Legislative Session, 2007.

§293.32. Qualifications of Directors.

The commission adopts §293.32(a)(1) to reflect revised qualifications for a supervisor on a board of an FWSD, except for an FWSD located wholly or partly in Denton County. The commission adopts this change to implement TWC, §53.063, as amended by HB 2984, 80th Legislative Session, 2007.

§293.41. Approval of Projects and Issuance of Bonds.

The commission adopts §293.41(e) to reflect that a district located outside of a planned community of at least 15,000 acres and wholly or partly within Montgomery County may issue bonds supported by taxes to fund recreational facilities. The commission adopts this change to implement TWC, §49.4645, as amended by HB 1127, 80th Legislative Session, 2007. In response to comment, the commission has revised §293.41(e) to reflect the intent of HB 1127.

§293.63. Contract Documents for Water District Projects.

In response to comment, the commission changed §293.63 to clarify that a district is not required to follow §293.63 if it is in conflict with the district's special law requirements.

The commission adopts §293.63(4) to reflect that a district must accept a bid bond, meeting all applicable requirements, as a bid deposit if a contract is over $250,000. The commission adopts this change to implement TWC, §49.271(c), as amended by HB 576, 80th Legislative Session, 2007.

The commission adopts §293.63(4) to reflect an increase in the threshold from $25,000 to $50,000 for which a bidder is required to submit a security deposit. The commission adopts this change to implement TWC, §49.271(c), as amended by SB 657, 80th Legislative Session, 2007.

The commission adopts §293.63(8) to reflect: an increase in the threshold from $25,000 to $50,000 for the requirement to advertise a district project; an increase in the threshold from $15,000 to $25,000 for the requirement to solicit at least three competitive bids; and a change in the notice publication requirement from three to two consecutive weeks. The commission adopts this change to implement TWC, §49.273(d), (e), and (f), as amended by SB 657, 80th Legislative Session, 2007.

The commission adopts §293.63(9) to reflect that the board of a special law district may elect to contract in accordance with TWC, §49.273, even if it conflicts with provisions in the district's special law. The commission adopts this change to implement TWC, §49.273(m), as added by SB 657, 80th Legislative Session, 2007.

The commission adopts §293.63(10) to reflect that a district with a population of more than 100,000 may use, on a limited basis, the design-build process to construct defined civil works projects. The commission adopts this change to implement Local Government Code, Chapter 271, Subchapter J, as added by HB 1886, 80th Legislative Session, 2007. The changes made by HB 1886, 80th Legislative Session, 2007, to add Local Government Code, Chapter 271, Subchapter J, regarding districts would apply to less than one percent of the total number of water districts subject to Chapter 293.

§293.201. District Acquisition of Road Powers.

The commission adopts changes to the heading of Subchapter P, Acquisition of Road Powers By A Municipality Utility District, to reflect changes in this subchapter under HB 3770, 80th Legislative Session, 2007.

The commission adopts §293.201 to reflect that road powers may be obtained at the time of creation of a MUD in addition to the existing provision for obtaining road powers after creation, and state the eligibility of roads that can be acquired, constructed, and financed by a MUD, and conveyed to a municipality, county, or state for operation and maintenance. The commission adopts this change to implement TWC, §54.234, as amended by HB 3770, 80th Legislative Session, 2007. In response to comment, the commission added eligible road improvements as provided by HB 3770 to the types of road powers for which a petitioner may petition the commission under §293.201(a).

§293.202. Application Requirements for Commission Approval.

The commission adopts §293.202 to: place existing requirements under new subsection (a) and modifying those requirements to reflect that road powers in lieu of road utility district powers can be obtained; delete the requirement that a MUD have

taxing authority to obtain road powers; and delete the requirement that preliminary plans be approved by the Texas Transportation Commission. The commission adopts this change to implement TWC, §54.234, as amended by HB 3770, 80th Legislative Session, 2007.

In response to comments, the commission has changed §293.202(a)(1) to remove the phrase "or written request" and to allow the petition to be signed by any authorized district board member; however, the commission declines to make the commenter's change regarding the specificity of the required narrative as this change is not supported by HB 3770.

In response to comment, the commission revised §293.202(a)(4) by deleting the requirement that an applicant for road powers separately file its petition with the city.

In response to comment, the commission changed §293.202(a)(7) to require providing preliminary layout of roads instead of preliminary plans because HB 3770 changed the statutory requirement.

In response to comment, the commission removed the reference to cost of notice from §293.202(a)(11) because there is no longer a notice requirement.

The commission adopts new §293.202(b) to reflect that road powers may be obtained at the time of creation of a MUD with applicable application requirements. The commission adopts this change to implement TWC, §54.234, as amended by HB 3770, 80th Legislative Session, 2007.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that this rulemaking is not subject to §2001.0225 because it does not meet the definition of "major environmental rule" as defined in the Texas Administrative Procedure Act. The act defines a "major environmental rule" as "a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state." Texas Government Code, §2001.0225(g)(3).

The specific intent of the adopted rules contained herein is to amend the rules to be consistent with recent legislative enactments. Specifically, the adopted rules address the administration of water districts relating to the bidding requirements (HB 576), the use of tax bonds to fund recreational facilities (HB 1127), the ability of a government entity to use a design-build process to construct civil works projects (HB 1886), the qualifications of an FWSD's supervisors (HB 2984), a city conditioning consent on fire flow requirements (HB 3378), acquisition of road powers by a MUD (HB 3770), as well as other bidding requirements (SB 657). The commission has determined that none of the amendments made to implement the foregoing legislation are made with the specific intent to protect the environment or reduce risks to human health from environmental exposure. Accordingly, the rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of "major environmental rule" as defined in the act.

The commission invited public comment of the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rules and performed an analysis of whether these rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these adopted rules is to implement certain recently enacted legislation relating to the administration of districts. The adopted rules address the administration of water districts relating to the bidding requirements (HB 576), the use of tax bonds to fund recreational facilities (HB 1127), the ability of a government entity to use a design-build process to construct civil works projects (HB 1886), the qualifications of an FWSD's supervisors (HB 2984), a city conditioning consent on fire flow requirements (HB 3378), acquisition of road powers by a MUD (HB 3770), as well as other bidding requirements (SB 657). This rulemaking substantially advances this stated purpose by making the commission's rules consistent with the new statutory language. The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these adopted rules because this action does not affect private real property.

Promulgation and enforcement of these adopted rules will constitute neither a statutory nor a constitutional taking of private real property. The adopted regulations do not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because this rulemaking does not burden nor restrict the owner's right to property. More specifically, these rules implement legislation addressing to the administration of districts relating to the bidding requirements (HB 576), the use of tax bonds to fund recreational facilities (HB 1127), the ability of a government entity to use a design-build process to construct civil works projects (HB 1886), the qualifications of an FWSD's supervisors (HB 2984), a city conditioning consent on fire flow requirements (HB 3378), acquisition of road powers by a MUD (HB 3770), as well as other bidding requirements (SB 657). These provisions do not impose any burdens or restrictions on private real property. Therefore, the adopted amendments do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4) relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment of the consistency of this rulemaking with the coastal management program during the public comment period. No comments were received regarding the consistency of this rulemaking with the coastal management program.

PUBLIC COMMENT

The commission held a public hearing for this rule on March 27, 2008 in Austin, Texas. The public comment period for this rulemaking closed on March 31, 2008. The commission received

comments from Allen, Boone, Humphries, Robinson, LLP on behalf of the Utility District Advisory Corporation (UDAC).

UDAC suggested modifications to the proposed rules as stated in the RESPONSE TO COMMENTS section of this preamble.

RESPONSE TO COMMENTS

UDAC commented that proposed changes to §293.41(e) did not accurately reflect HB 1127 as the proposed language potentially included a broader exception for districts that are not excepted by the bill.

The commission agrees that the rule should be revised to reflect the intent of HB 1127 and has added language from the bill to prevent misinterpretation. This action will ensure that the commission rules accurately reflect the bill. While the proposed rule language did reflect the intent of HB 1127, the commission agrees that the proposed language could be interpreted to apply to entities other than what was specified in the bill. Therefore, to avoid possible misinterpretation of the rule, the commission has added language to §293.41(e) to plainly state that the rule applies to areas within a planned development of at least 15,000 acres, of which a majority of the developed acreage is subject to restrictive covenants containing ad valorem assessments.

UDAC commented that proposed changes to §293.63 from SB 657 should clarify that, by special law, a district's contracting requirements may be different than the requirements spelled out in §293.63.

The commission agrees with this comment and has changed §293.63 to clarify that a district is not required to follow §293.63 if it is in conflict with the district's special law requirements. The commission agrees that a special law affecting a district may mandate different requirements than those found in §293.63. The commission has added language to §293.63 to ensure that there is no confusion regarding compliance with special law requirements.

UDAC commented that proposed §293.201(a) did not include a complete summary of road powers under HB 3770 as the phrase "and any improvement in aid of the roads (for example, traffic signalization and signs)" was omitted.

The commission agrees with this comment and has added eligible road improvements as provided by HB 3770 to the types of road powers for which a petitioner may petition the commission under §293.201(a). This addition will ensure that the commission rules accurately reflect the bill.

UDAC commented that §293.201(c) should be added to provide guidance regarding use of bond proceeds for road facilities to ensure compliance with TWC, §54.234, and the Office of Attorney General's requirements.

The commission declines to make this change as TWC, §54.234, spells out eligible projects and the proposed change is outside scope of this rulemaking. Additionally, the commission's rule provides guidance for obtaining road powers. The commission's rule is not intended to address the issuance of bonds for road facilities.

UDAC commented that §293.202(a)(1) should reflect requiring a petition, not a petition or written request, that the required narrative should be general rather than detailed, and that the petition should be signed by any member of the board, instead of just the board president.

The commission agrees with the first comment as HB 3770 refers only to a petition and removing the phrase "or written request" will reduce confusion and maintain consistency with the bill. The commission also agrees with the third comment as this change is consistent with HB 3770 as the bill does not require the petition be signed by the board president. The commission has changed §293.202(a)(1) to remove the phrase "or written request" and to allow the petition to be signed by any authorized district board member; however, the commission declines to make the commenter's change regarding the specificity of the required narrative as this change is not supported by HB 3770.

UDAC commented that §293.202(a)(4) should be changed to reflect that evidence of city consent be provided in lieu of a separate statement from the city. UDAC's comment indicates that city consent is sought prior to submitting a request to the commission for road powers, and that requiring the request be filed with the city at the time of submitting an application to the commission is unnecessary.

The commission agrees that §293.202(a)(4) should be revised because the means by which a city may provide input has changed due to recent legislation. The purpose of the separate petition filing was to give the city notice of the petition for road powers. HB 1541, 78th Texas Legislature, 2003, deleted the requirement for public notice of a road powers application and the related requirement for a district to obtain Texas Department of Transportation approval of road powers; therefore, consideration of public comment is no longer part of this process. The separate petition filing with the city is unnecessary because there is no public forum to address the city's concerns after the city has either granted its consent or the applicant has provided to the commission its evidence of compliance with TWC, §54.016.

UDAC commented that §293.202(a)(7) should be changed to delete the requirement of preliminary plans and instead provide a preliminary layout of proposed roads, a document that is readily available and more cost-effective to produce at this point in the process.

The commission responds that §293.202(a)(7) should be changed to require that an applicant provide a preliminary layout of roads as the statutory requirement changed. Previously, a district was required to petition the commission and the Texas Department of Transportation for road utility district powers under Texas Transportation Code, Chapter 441, which required evidence of preliminary plans. Due to changes made to TWC, §54.234 in HB 3770, a MUD can no longer obtain road utility district powers but instead can obtain road powers. This change deleted the necessity for preliminary plans to be provided to the commission. Instead, a preliminary layout is required to demonstrate eligibility of proposed road under TWC, §54.234.

UDAC commented that §293.202(a)(11) should be changed to delete the reference to cost of notice since there is no notice requirement, and therefore no associated cost.

The commission agrees and has removed the reference to cost of notice from §293.202(a)(11) because there is no longer a notice requirement. HB 1541, 78th Texas Legislature, 2003, deleted the requirement for a district to obtain Texas Department of Transportation approval of road powers and deleted requirements regarding notice of an application for road powers.

UDAC commented that the commission should make a formal and final determination of whether the commission has the authority and responsibility to adopt rules related to the commis-

sion's approval of road bonds. UDAC points to the requirement of TWC, §49.181(a) which is "{a} district may not issue bonds unless the commission determines that the project to be financed by the bonds is feasible and issues an order approving the issuance of the bonds." The comment states that the commission should be reviewing bonds for roads since TWC, §49.181(a) does not make a distinction as to the type of facilities.

The commission declines to issue rules for reviewing road bonds without clear express authority from the Legislature to do so. A previous rule project, Rule Number 2005-058-293-PR, had included proposed rules on commission review of district bonds for road facilities. Prior to that rule package's adoption, the language regarding review of bonds for roads was withdrawn by staff for further consideration on the issues relating to commission review due to the various comments received. At the October 4, 2006 agenda, the commission adopted the 2005-058-293-PR rule project, and staff was directed to continue discussions with stakeholders regarding commission review of bonds for road facilities. Further discussions with stakeholders indicate that there is no agreement as to the commission's authority for review of district road bonds. The commission declines to make any changes to the proposed rules in response to this comment.

SUBCHAPTER B. CREATION OF WATER DISTRICTS

30 TAC §293.11

STATUTORY AUTHORITY

This amendment is adopted under the authority of Texas Water Code (TWC), §54.016, as amended by HB 3378, which provides that when city consent is required for the creation of a district, the city may require the district's system to meet fire flow requirements; and TWC, §54.234, as amended by HB 3770, which provides that a MUD can acquire road powers during the creation process; and TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state of Texas, to establish and approve all general policy of the commission.

The adopted amendment implements TWC, §§54.016(i), 54.234, and 5.103.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Robert Martinez
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For further information, please call: (512) 239-0177

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SUBCHAPTER D. APPOINTMENT OF DIRECTORS

30 TAC §293.32

STATUTORY AUTHORITY

The amendment is adopted under the authority of Texas Water Code (TWC), §53.063, as amended by HB 2984, which provides revised qualifications for a supervisor on a board of an FWSD, except one located wholly or partly in Denton County; and, TWC, §5.103, and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state and to establish and approve all general policy of the commission.

The adopted amendment implements TWC, §53.063 and §5.103.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. ISSUANCE OF BONDS

30 TAC §293.41

STATUTORY AUTHORITY

The amendment is adopted under the authority of Texas Water Code (TWC), §49.4645, as amended by HB 1127, which provides that a district located outside of planned community of at least 15,000 acres and wholly or partly within Montgomery County may issue bonds supported by taxes to fund recreational facilities; and, TWC, §5.103, and §5.105 which provide the commission with the authority to adopt any sections necessary to carry out its powers and duties under the TWC and other laws of the state of Texas and to establish and approve all general policy of the commission.

The adopted amendment implements TWC, §49.4645 and §5.103.

§293.41. Approval of Projects and Issuance of Bonds.

(a) Bonds, as referred to in this subchapter, include any bonds authorized to be issued by the Texas Water Code (TWC) or special statute, and are represented by an instrument issued in bearer or registered form. This section does not apply to:

(1) refunding bonds, if the commission issued an order approving the issuance of the bonds or notes that originally financed the project;

(2) refunding bonds that are issued by a district under an agreement between the district and a municipality allowing the issuance of the district's bonds to refund bonds issued by the municipality to pay the cost of financing facilities;

(3) bonds issued to and approved by the Farmers Home Administration, the United States Department of Agriculture, the North American Development Bank, or the Texas Water Development Board, or successor agencies; or

(4) refunding bonds issued to refund bonds described by paragraph (3) of this subsection.

(b) This subchapter does apply to revenue notes to the extent described in §293.80(d) of this title (relating to Revenue Notes) and contract tax obligations to the extent described in §293.89 of this title (relating to Contract Tax Obligations).

(c) The commission has the statutory responsibility to approve projects relating to the issuance and sale of bonds for districts as defined in TWC, §49.001(1), and other districts where specifically required by law.

(d) This subchapter does not apply to a district if:

(1) the boundaries include one entire county;

(2) the district was created by a special act of the legislature; and

(A) the district is located entirely within one county and entirely within one or more home-rule municipalities;

(B) the total taxable value of the real property and improvements to the real property, zoned by one or more home-rule municipalities for residential purposes and located within the district, does not exceed 25% of the total taxable value of all taxable property in the district, as shown by the most recent certified appraisal tax roll prepared by the appraisal district for the county; and

(C) the district was not required by law to obtain commission approval of its bonds before September 1, 1995;

(3) the district is a special water authority as defined by TWC, §49.001(8);

(4) the district is governed by a board of directors appointed in whole or part by the governor, a state agency, or the governing body or chief elected official of a municipality or county and does not provide, or propose to provide, water, wastewater, drainage, reclamation, or flood control services to residential retail or commercial customers as its principal function; or

(5) the district:

(A) is a municipal utility district operating under TWC, Chapter 54, that includes territory in only two counties;

(B) has outstanding long-term indebtedness that is rated BBB or better by a nationally recognized rating agency for municipal securities; and

(C) has at least 5,000 active water connections.

(e) A district located within Bastrop, Bexar, Brazoria, Fort Bend, Galveston, Harris, Montgomery (except for a district all or part of which is located in Montgomery County and includes land within a planned community of at least 15,000 acres, of which a majority of the developed acreage is subject to restrictive covenants containing ad valorem assessments), Travis, Waller, or Williamson Counties may submit bond applications, which include recreational facilities that are supported by taxes, in accordance with TWC, §49.4645.

(1) Bond applications submitted under this subsection must include a copy of a district's park plan as required under TWC, §49.4645(b), in addition to other application requirements under §293.43 of this title (relating to Application Requirements). The park plan is to be signed and sealed by a registered landscape architect, a registered professional engineer, or any other design professional allowed by law to engage in landscape architecture.

(2) Bond applications submitted under this subsection may include:

(A) forests, greenbelts, open spaces, and native habitat;

(B) sidewalks, trails, paths, boardwalks, and fitness trail equipment, subject to the following restrictions:

(i) the sidewalks, trails, paths, boardwalks, and fitness trail equipment unrelated to golf courses;

(ii) the sidewalks, trails, paths, boardwalks, and fitness trail equipment located outside of the right-of-way required by applicable government agencies for streets, unless a district has completed and financed at least 90% of its projected water, wastewater, and drainage facilities to serve residential development within the district; and

(iii) if a district has completed and financed at least 90% of its projected water, wastewater, and drainage facilities to serve residential development within the district prior to the annexation of land, the location restriction in clause (ii) of this subparagraph only applies to annexed land;

(C) pedestrian bridges and underpasses that are less than 200 feet in length and not related to golf courses;

(D) outdoor ballfields, including, but not limited to, soccer, football, baseball, softball, and lacrosse, outdoor skate/roller blade facilities, associated scoreboards, and bleachers designed for less than 500 people per field or per skate/roller blade facility;

(E) parks (outdoor playground facilities and associated ground surface material, picnic tables, benches, barbeque grills, fire pits, fireplaces, trash receptacles, drinking water fountains, open-air pavilions/gazebos, open-air amphitheaters/assembly facilities designed for less than 500 people, open-air shade structures, restrooms and changing rooms, concession stands, water playgrounds, recreational equipment storage facilities, and emergency call boxes);

(F) amenity lakes, and associated water features, docks, piers, overlooks, and non-motorized boat launches subject to §293.44(a)(24) of this title (relating to Special Considerations);

(G) amenity/recreation centers, outdoor tennis courts, and outdoor basketball courts if the district has funded water, wastewater, and drainage facilities to serve at least 90% of the residential development within the district;

(H) fences no higher than eight feet that are located within public right-of-way or district sites/easements and are along streets if the district has funded water, wastewater, and drainage facilities to serve at least 90% of the residential development within the district; and

(I) landscaping (including, but not limited to, trees, shrubs, and berms) and associated irrigation, fences, information signs/kiosks, lighting (except street lighting), and parking related to items listed in subparagraphs (A) through (G) of this paragraph.

(3) Bond applications submitted under this subsection shall not include:

(A) indoor or outdoor swimming pools, pool decks, and associated equipment or storage facilities;

(B) golf courses, clubhouses, and related structures or facilities;

(C) air conditioned buildings, gymnasiums, spas, fitness centers, and habitable structures, except as allowed in paragraph (2) of this subsection;

(D) sound barrier walls;

(E) retaining walls used for roadway purposes;

(F) fences, such as for subdivisions and lots, which are not related to district facilities, except as allowed in paragraph (2) of this subsection;

(G) signs and monuments, such as for subdivisions and developments, which are not related to district facilities; and

(H) street lighting.

(4) A district's outstanding principal debt (bonds, notes, and other obligations), payable from any source, for recreational facilities must not exceed 1% of the taxable value of property in the district, as supported by a certificate from the central appraisal district, at the time of issuance of the debt or exceed the estimated cost provided in the park plan required under TWC, §49.4645(b), whichever is smaller.

(5) A district may submit a bond application that proposes to fund recreational facilities only after or at the same time a district has funded water, wastewater, and/or drainage facilities, depending on a district's authorized functions, to serve the section that includes the recreational facilities or to serve areas along roads that are either adjacent to the recreational facilities or are necessary to provide access to the recreational facilities.

(6) Plans and specifications for recreational facilities must be signed and sealed by a registered landscape architect, a registered professional engineer, or any other design professional allowed by law to engage in landscape architecture.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. DISTRICT ACTIONS RELATED TO CONSTRUCTION PROJECTS AND PURCHASE OF FACILITIES

30 TAC §293.63

STATUTORY AUTHORITY

The amendment is adopted under the authority of the Texas Water Code (TWC), §49.271(c), as amended by HB 576, which provides that a district must accept a bid bond, meeting all applicable requirements, as a bid deposit if a contract is over $250,000; and as amended by SB 657, which increases the threshold from $25,000 to $50,000 for which a bidder is required to submit a security deposit; and TWC, §49.273(d) - (f), as amended by SB 657, which increases the threshold from $25,000 to $50,000 the requirement to advertise a district project, increases the threshold from $15,000 to $25,000 the requirement to solicit at least three competitive bids, and a change in the notice publication requirement from three to two consecutive weeks; and TWC, §49.273(m), as added by SB 657, which provides that the board of a special law district may elect to contract in accordance with TWC, §49.273 even if it conflicts with provisions in the district's special law; and, Local Government Code, Chapter 271, Subchapter J, as added by HB 1886, which provides that a district with a population of more than 100,000 may use on a limited basis the design-build process to construct defined civil works projects; and, TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state and to establish and approve all general policy of the commission.

The adopted amendment implements TWC, §49.271(c) and §5.103.

§293.63. Contract Documents for Water District Projects.

Contract documents for water district construction projects shall be prepared in general conformance with those adopted and recommended by the Texas Section of the American Society of Civil Engineers (latest revision). The following specific requirements must apply, unless otherwise provided by a district's special law.

(1) All contract documents shall be prepared in such a manner as to promote competitive bidding and to ensure that all bids are prepared on a common basis.

(2) The instruction to bidders section of the contract documents shall give special attention to the following items.

(A) The basis of award shall be clearly defined. If alternate proposals are to be considered, the instructions to bidders shall clearly state in which order the alternates will be considered in determining the most advantageous bid. If two or more contracts are to be awarded, the instructions to bidders shall clearly indicate if combined bids, or tied bids, will be allowed, or if each contract will be awarded separately.

(B) The contract should clearly provide that alternate bids will not be considered, unless specifically allowed by instructions to bidders and requested in the proposal form.

(C) Specific notice shall be given that qualifying statements or accompanying qualifying letters will be cause for rejection of the bid.

(D) Provision shall be made for prospective bidders to request additional information, explanations, or interpretations regarding contract documents prior to the bid opening. All requests and answers to all such requests shall be given in writing. Answers will be in addendum form to all prospective bidders.

(3) The district shall require the bidder to whom the district proposes to award the contract to submit a statement of qualifications. The statement shall include such data as the district may reasonably require to determine whether the contractor is responsible and capable of completing the proposed project.

(4) For contracts over $50,000 the district shall require bidders to submit certified or cashier's checks or a bid bond issued by a surety legally authorized to do business in this state in an amount of at least 2.0% of the total amount of the bid. For a contract greater than $250,000 the district must accept a bid bond if it meets all requirements. If cashier's checks are required, the checks for all bidders except the three most qualified bidders shall be returned within three days of the bid opening.

(5) The district shall require that bidders submit, along with the bid, the name of the person, firm, or corporation that will execute payment and performance bonds.

(6) The district may establish criteria for acceptability of the surety company issuing payment and performance bonds including, but not limited to:

(A) authorization to do business in Texas; and

(B) authorization to issue payment and performance bonds in the amount required for the contract and:

(i) a rating of at least B from Best's Key Rating Guide; or

(ii) if the surety company does not have any such rating due to the length of time it has been a surety company, the surety company must demonstrate eligibility to participate in the surety bond guarantee program of the Small Business Administration and must be an approved surety company listed in the current United States Department of Treasury Circular 570. Such performance and payment bonds shall meet the criteria contained in the rules and regulations promulgated by the United States Department of Treasury with respect to performance and payment bonds for federal jobs, including specifically the rules related to the underwriting limitation. The district shall satisfy itself that such surety company and bonds meet such criteria.

(7) The district shall satisfy itself that all persons executing the bonds are duly authorized by the laws of the State of Texas and the surety company to do so.

(8) For contracts over $50,000, a district's board shall advertise the project once a week for two consecutive weeks. For contracts over $25,000 but not more than $50,000, a district's board shall solicit written competitive bids on the project from at least three bidders. For contracts not more than $25,000, a district's board is not required to advertise or seek competitive bids.

(9) A board of a special law district may elect to contract in accordance with the requirements in Texas Water Code, §49.273, even if those requirements conflict with provisions in the district's special law.

(10) A district with a population of more than 100,000 may utilize the design-build procedure for limited projects as provided in Local Government Code, Chapter 271, Subchapter J.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER P. ACQUISITION OF ROAD POWERS BY MUNICIPAL UTILITY DISTRICT

30 TAC §293.201, §293.202

STATUTORY AUTHORITY

The amendments are adopted under the Texas Water Code (TWC), §54.234, as amended by HB 3770, which provides that road powers may be obtained at the time of creation of a MUD in addition to the existing provision for obtaining road powers after creation, and to state the eligibility of roads that can be acquired, constructed, and financed by a MUD, and conveyed to a municipality, county, or state for operation and maintenance; and, TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any sections necessary to carry out its powers and duties under the TWC and other laws of the state of Texas and to establish and approve all general policy of the commission.

The adopted amendments implement TWC, §54.234, as amended by HB 3770, and TWC, §5.103.

§293.201. District Acquisition of Road Powers.

(a) Texas Water Code (TWC), §54.234, authorizes a municipal utility district, or any petitioner seeking the creation of a municipal utility district, to petition the commission to acquire road powers for eligible roads under TWC, §54.234(b), and any improvement in aid of the roads, which are to be conveyed to this state, a county, or municipality for operation and maintenance.

(b) This section and §293.202 of this title (relating to Application Requirements for Commission Approval) provide the requirements for petitioning the commission for road powers.

§293.202. Application Requirements for Commission Approval.

(a) A conservation and reclamation district, operating under Texas Water Code (TWC), Chapter 54, may submit to the executive director of the commission an application for road powers, which shall include the following documents:

(1) a petition that will include a detailed narrative statement of the reasons for requesting road powers and the reasons why such powers will be of benefit to the district and to the land that is included in the district, signed by an authorized member of the board of directors of the district;

(2) a certified copy of the resolution of the governing board of the district authorizing the district to petition the commission for road powers;

(3) a certification that the district is operating under TWC, Chapter 54, with proper statutory references;

(4) evidence that the municipality in whose corporate limits or extraterritorial jurisdiction that any part of the district is located has consented to the creation of the district with road powers or has consented to the district having road powers subsequent to creation, or that the provisions of TWC, §54.016, have been followed;

(5) a certified copy of the latest audit of the district performed under TWC, §§49.191 - 49.194;

(6) for districts that have not submitted an annual audit, a financial statement of the district, including a detailed itemization of all assets and liabilities showing all balances in effect not later than 30 days before the date that the district submits its request for approval with the executive director;

(7) a preliminary layout showing the proposed location for all road facilities to be constructed, acquired, or improved by the district;

(8) a cost analysis and detailed cost estimate of the proposed road facilities to be constructed, acquired, or improved by the district with a statement of the amount of bonds estimated to be necessary to finance the proposed construction, acquisition, and improvement;

(9) a narrative statement that will analyze the effect of the proposed facilities upon the district's financial condition and

will demonstrate that the proposed construction, acquisition, and improvement is financially and economically feasible for the district;

(10) any other information that may be required by the executive director; and

(11) a filing fee in the amount of $100.

(b) A petition for creation of a district submitted under §293.11(a) and (d) of this title (relating to Information Required to Accompany Applications for Creation of Districts) may also include a request for road powers, with information required under subsection (a)(4), and (7) - (9) of this section, to also be provided.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 335. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE

SUBCHAPTER A. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE IN GENERAL

30 TAC §335.6, §335.25

The Texas Commission on Environmental Quality (Commission) adopts amendments to §335.6 and §335.25. Section 335.6 is adopted *with changes* to the proposed text as published in the February 1, 2008, issue of the *Texas Register* (33 TexReg 895). Section 335.25 is adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

House Bills (HB) 1457 and 1719, 80th Legislature, 2007, amended Texas Water Code (TWC), §26.303(a)(1) and Texas Agriculture Code, §201.026(b), (c), (f), (g), (h), (i), and (j). The rule will implement the statutory requirements of HB 1719 which eliminates certain notification requirements and HB 1457 which eliminates the use of poultry carcasses as swine food.

HB 1719 eliminated the requirement to notify the commission of the burial of animal carcasses provided that at the time of disposal of animal carcasses on-site, the landowner has requested and complies with a water quality management plan developed for that site under Texas Agricultural Code, §201.026(f) as added by Acts 2001, 77th Legislature, Chapter 1189, §1 (relating to Nonpoint Source Pollution). HB 1457 eliminates the disposal option of using poultry carcasses as swine food.

SECTION BY SECTION DISCUSSION

Since proposal, the text of §335.6(c) has been moved to §335.6(l) without changes. Adopted §335.6 has also been re-lettered accordingly. This change was necessary to avoid creating conflicting cross-references in other portions of Chapter 335, which would require correction in subsequent rulemakings. This change will also eliminate the need for the commission to revise both internal training and public guidance documents which currently reference §335.6(c) - (k).

Adopted §335.6(l) will exempt landowners who comply with a certified water quality management plan developed for that site under Texas Agricultural Code, §201.026(f) as added by Acts 2001, 77th Legislature, Chapter 1189, §1 from notification requirements found in §335.6(a) and (b). This new language will meet the statutory requirements of HB 1719.

Adopted amendments to §335.25(a)(6) will eliminate the disposal option of using poultry carcasses for swine food. The item following subsection (a)(6) will be re-numbered to acknowledge removal of this subsection. The elimination of the use of poultry carcasses as swine food will make §335.25 consistent with the Texas Agriculture Code, which currently prohibits the use of poultry carcasses as swine food. This new language will meet the statutory requirements of HB 1457.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act.

A "major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the adopted rulemaking is to conform commission rules to the newly amended language of Texas Agriculture Code, §201.026(g), as added by Acts 2001, 77th Legislature, Chapter 1189, §1, and TWC, §26.303(a)(1). The adopted rulemaking does this by exempting landowners who comply with a certified water quality management plan under Texas Agriculture Code, §201.026(f) as added by Acts 2001, 77th Legislature, Chapter 1189, §1 from the notification requirements imposed by §335.6(a) and (b), and by eliminating "cooking for swine food" as an acceptable method of disposal of poultry carcasses. Since the adopted rulemaking simply harmonizes commission rules with the Texas Agriculture Code and TWC, there will be no impact on the environment, human health, or public health and safety. In this same way, the adopted rulemaking will not adversely affect the economy, a sector of the economy, productivity, competition, or jobs within the state or a sector of the state. The commission concludes that the adopted rulemaking does not meet the definition of a major environmental rule.

Furthermore, even if the adopted rulemaking did meet the definition of a major environmental rule, it is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicable requirements specified in §2001.0225(a). Texas Government Code, §2001.0225(a) applies only to a state agency's adoption of a major environmental rule that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal

government to implement a state and federal program; or 4) was adopted solely under the general powers of the agency instead of under a specific state law.

In this case, the adopted rulemaking does not meet any of these requirements. First, there are no applicable federal standards that this rulemaking would address. Second, the adopted rulemaking does not exceed an express requirement of state law, but rather is necessary to harmonize commission rules with Texas Agriculture Code, §201.026(g), as added by Acts 2001, 77th Legislature, Chapter 1189, §1, and TWC, §26.303(a)(1). Third, the adopted rulemaking does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state or federal program. Finally, the commission adopts this rulemaking under TWC, §§5.103, 5.105, and 26.303(a), and under Texas Health and Safety Code (THSC), §361.017 and §361.024. Therefore, the commission does not adopt the rules solely under the commission's general powers. The commission invited but received no public comments regarding the Regulatory Impact Analysis determination during the public comment period.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rules and performed an analysis of whether they constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted rulemaking is to conform commission rules to the newly amended language of Texas Agriculture Code, §201.026(g), as added by Acts 2001, 77th Legislature, Chapter 1189, §1, and TWC, §26.303(a)(1). This rulemaking substantially advances that stated purpose by exempting landowners who comply with a certified water quality management plan under Texas Agriculture Code, §201.026(f) as added by Acts 2001, 77th Legislature, Chapter 1189, §1, from the notification requirements imposed by §335.6(a) and (b), and by eliminating "cooking for swine food" as an acceptable method of disposal of poultry carcasses.

Promulgation and enforcement of the adopted rules will not be a statutory or constitutional taking of private real property. Specifically, the adopted rulemaking does not affect a landowner's rights in private real property because it does not burden (constitutionally), restrict, or limit the owner's right to real property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, the adopted rulemaking exempts landowners with a water quality management plan in place from notifying the commission before burying animal carcasses on their property, and eliminates "cooking for swine food" as an acceptable method of disposal of poultry carcasses. These actions will not affect private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rules and determined that the adopted rules are neither identified in, nor will they affect, any action/authorization identified in Coastal Coordination Act Implementation Rules 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP). Therefore, the adopted rulemaking action is not subject to the CMP.

PUBLIC COMMENT

A public hearing was held in Austin on February 26, 2008 at 10:00 a.m. at the commission's central office located at 12100 Park 35 Circle. The comment period closed on March 3, 2008. An oral comment was received from the Texas Poultry Federation and Affiliates, at the public hearing. No written comments were received.

RESPONSE TO COMMENTS

Texas Poultry Federation and Affiliates, indicated support of the proposed rule.

The commission appreciates this comment. No changes have been made in response to this comment.

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which authorizes the commission to adopt rules as necessary to carry out its powers and duties under the TWC; and TWC, §26.303(a), which authorizes the commission to adopt rules for the safe and adequate handling, storage, transportation, and disposal of poultry carcasses. The amendments are also adopted under Texas Health and Safety Code (THSC), §361.017 and §361.024, which provide the commission the authority to adopt rules necessary to carry out its powers and duties under the Texas Solid Waste Disposal Act.

The amendments implement TWC, §§5.013, 5.102, 5.103, 5.105, and 26.303(a) and THSC, §361.017 and §361.024.

§335.6. Notification Requirements.

(a) Any person who intends to store, process, or dispose of industrial solid waste without a permit, as authorized by §335.2(d), (e), (f), or (h) of this title (relating to Permit Required) or §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials), shall notify the executive director in writing or using electronic notification software provided by the executive director, that storage, processing, or disposal activities are planned, at least 90 days prior to engaging in such activities. Recycling operations may commence 90 days after the initial notification of the intent to recycle, or upon receipt of confirmation that the executive director has reviewed the information found in this section. The executive director may require submission of information necessary to determine whether storage, processing, or disposal is compliant with the terms of this chapter. Required information may include, but is not limited to, information concerning waste composition, waste management methods, facility engineering plans and specifications, or the geology where the facility is located. Any registered generator who generates 1,000 kilograms or more of hazardous waste in any calendar month, must meet the requirements of this subsection by electronic notification using software provided by the executive director unless the executive director has granted a written request to use paper forms or an alternative notification method or the software does not have features capable of meeting the requirements.

(b) Any person who stores, processes, or disposes of municipal hazardous waste or industrial solid waste shall have the continuing obligation to immediately provide notice to the executive director in writing or using electronic notification software provided by the executive director, of any changes or additional information concerning waste composition, waste management methods, facility engineering plans and specifications, or the geology where the facility is located to that reported in subsection (a) of this section, authorized in any permit, or stated in any application filed with the commission. Any registered generator who generates 1,000 kilograms or more of hazardous waste

in any calendar month, must meet the requirements of this subsection by electronic notification using software provided by the executive director unless the executive director has granted a written request to use paper forms or an alternative notification method or the software does not have features capable of meeting the requirements.

(c) Any person who generates hazardous waste in a quantity greater than the limits specified in §335.78 of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators) in any calendar month or greater than 100 kilograms in any calendar month of industrial Class 1 waste shall notify the executive director of such activity using electronic notification software or paper forms provided by the executive director. Any registered generator who generates 1,000 kilograms or more of hazardous waste in any calendar month, must meet the requirements of this subsection by electronic notification using software provided by the executive director unless the executive director has granted a written request to use paper forms or an alternative notification method or the software does not have features capable of meeting the requirements. The executive director may require submission of information necessary to determine whether the storage, processing, or disposal is compliant with the terms of this chapter. Notifications submitted pursuant to this section shall be in addition to information provided in any permit applications required by §335.2 of this title, or any reports required by §335.9 of this title (relating to Recordkeeping and Annual Reporting Procedures Applicable to Generators), §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste), and §335.13 of this title (relating to Recordkeeping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste). Any person who provides notification pursuant to this subsection shall have the continuing obligation to immediately document any changes or additional information with respect to such notification and within 90 days of the occurrence of such change or of becoming aware of such additional information, provide notice to the executive director in writing or using electronic notification software provided by the executive director, of any such changes or additional information to that reported previously. Any registered generator who generates 1,000 kilograms or more of hazardous waste in any calendar month, must meet the requirements of this subsection by electronic notification using software provided by the executive director unless the executive director has granted a written request to use paper forms or an alternative notification method or the software does not have features capable of meeting the requirements. If waste is recycled on-site or managed pursuant to §335.2(d) of this title, the generator must also comply with the notification requirements specified in subsection (h) of this section. The information submitted pursuant to the notification requirements of this subchapter and to the additional requirements of §335.503 of this title (relating to Waste Classification and Waste Coding Required) shall include, but is not limited to:

(1) a description of the waste;

(2) a description of the process generating the waste;

(3) the composition of the waste;

(4) a proper hazardous waste determination which includes the appropriate EPA hazardous waste number(s) described in 40 Code of Federal Regulations (CFR) Part 261. Generators must determine whether such waste is hazardous as defined in 40 CFR Part 261 and submit the results of that hazardous waste determination to the executive director;

(5) the disposition of each solid waste generated, if subject to the notification requirement of this subsection, including the following information:

(A) whether the waste is managed on-site and/or off-site;

(B) a description of the type and use of each on-site waste management facility unit;

(C) a listing of the wastes managed in each unit; or

(D) whether each unit is permitted, or qualifies for an exemption, under §335.2 of this title.

(d) Any person who transports hazardous or Class 1 waste shall notify the executive director of such activity on forms furnished or approved by the executive director, except:

(1) industrial generators who generate less than 100 kilograms of Class 1 waste per month and less than the quantity limits of hazardous waste specified in §335.78 of this title and who only transport their own waste; and

(2) municipal generators who generate less than the quantity limits of hazardous waste specified in §335.78 of this title and who only transport their own waste.

(e) Persons operating transfer facilities in accordance with §335.94 of this title (relating to Transfer Facility Requirements) shall notify the executive director of such activity.

(f) Upon written request of the executive director, any person who ships, stores, processes, or disposes of industrial solid waste or hazardous waste, as defined in this subchapter, shall perform a chemical analysis of the solid waste and provide results of the analysis to the executive director.

(g) Any person who stores, processes, or disposes of industrial solid waste or municipal hazardous waste shall notify the executive director in writing of any activity of facility expansion not authorized by permit, at least 90 days prior to conducting such activity. Such person shall submit to the executive director upon request such information as may reasonably be required to enable the executive director to determine whether such activity is compliant with this chapter.

(h) Any person who conducts or intends to conduct the recycling of industrial solid waste or municipal hazardous waste as defined in §335.24 of this title or Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Facilities) and who is required to notify under §335.24 of this title or Subchapter H of this chapter must submit in writing to the executive director, at a minimum, the following information: the type(s) of industrial solid waste or municipal hazardous waste to be recycled, the method of storage prior to recycling, and the nature of the recycling activity. New recycling activities require such notification a minimum of 90 days prior to engaging in such activities. Recycling operations may commence 90 days after the initial notification of the intent to recycle, or upon receipt of confirmation that the executive director has reviewed the information found in this section. Persons engaged in recycling of industrial solid waste or municipal hazardous waste prior to the effective date of this section shall submit such notification within 60 days of the effective date of this subsection.

(i) The owner or operator of a facility qualifying for the small quantity burner exemption under 40 CFR §266.108 must provide a one-time signed, written notification to the EPA and to the executive director indicating the following:

(1) The combustion unit is operating as a small quantity burner of hazardous waste;

(2) The owner and operator are in compliance with the requirements of 40 CFR §266.108, §335.221(a)(19) of this title (relating to Applicability and Standards) and this subsection of this section; and

(3) The maximum quantity of hazardous waste that the facility may burn as provided by 40 CFR §266.108(a)(1).

(j) Notification and regulation requirements on nonhazardous used oil, oil made characteristically hazardous by use (instead of mixing), CESQG hazardous used oil, and household used oil after collection that will be recycled are found in Chapter 324 of this title (relating to Used Oil).

(k) Other portions of this chapter that relate to solid wastes that are recycled include §335.1 of this title (relating to Definitions), under the definition of "Solid Waste," §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials), §335.18 of this title (relating to Variances from Classification as a Solid Waste), §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste), §335.24 of this title, and Subchapter H of this chapter.

(l) A landowner who disposes of domestic or exotic animal carcasses and who complies with a certified water quality management plan developed for their site under Texas Agriculture Code, §201.026(f) as added by Acts 2001, 77th Legislature, Chapter 1189, §1 (relating to Nonpoint Source Pollution) is exempt from the notification requirements of subsections (a) and (b) of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 335. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE

The Texas Commission on Environmental Quality (agency, commission or TCEQ) adopts the repeal of §§335.401 - 335.403 and §§335.405 - 335.412. Simultaneously, the commission adopts new §§335.401 - 335.403, 335.405, 335.407, 335.409, 335.411, 335.413, 335.415, 335.417, and 335.419

The commission adopts the repeal of §§335.401 - 335.403 and §§335.405 - 335.412 and new §335.415 and §335.419 *without changes* to the proposal as published in the February 15, 2008, issue of the *Texas Register* (33 TexReg 1239) and will not be republished. The commission adopts new §§335.401 - 335.403, 335.405, 335.407, 335.409, 335.411, 335.413, and 335.417 *with changes* to the proposed text.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

In order to make substantial reorganization and amendments to the previous rules, the commission adopts new rules for household hazardous waste (HHW) concurrently with the repeal of the previous rules for HHW. The adopted rules revise and reorganize the rules for the commission's HHW program. The commission encourages the collection of HHW for reuse, for recycling, or for its eventual disposal or processing by a method appropriate for hazardous waste.

HHW is household generated waste that would be classified as hazardous waste except for an exclusion in federal rules. Wastes from households are specifically excluded from classification as hazardous waste by the United States Environmental Protection Agency (EPA) under 40 Code of Federal Regulations (CFR) §261.4(b)(1), which specifies that these wastes are solid waste. The wastes from households that would be hazardous waste except for the exclusion are termed "hazardous household waste" or "household hazardous waste" (the terms have the same meaning and are often abbreviated using the acronym "HHW"). The exemption is based on the EPA's determination that Congress did not intend to impose the hazardous waste program requirements on wastes generated by household consumers. Although HHW is exempted from regulation as hazardous waste, HHW may present the same properties, characteristics, and safety concerns as hazardous waste. Because the collection of HHW involves aggregating relatively large volumes of hazardous materials in a relatively small area, proper practices and proper disposal or processing are needed for the collections to occur safely and to avoid any adverse impacts. The legislature requires by statute that the commission provide rules covering standards for HHW collections and training of staff working at collections. These rules provide the standards for HHW collections and cover the requirements for training staff to conduct the collections safely.

As solid waste, these materials can usually be disposed in the normal municipal solid waste stream and sent to a landfill (if accepted by the landfill). However, because there are better disposal and processing options available, some entities choose to collect HHW from the public and manage it by having it reused for its intended purpose or having it recycled, processed, or disposed as hazardous waste. Typical HHW includes some solvents, pesticides, paints, cleaning products, fuels, automotive fluids, batteries, and other consumer products from households that would be hazardous waste when disposed except for the federal exclusion for household wastes. Because these household wastes are exempt from hazardous waste regulation, they can be disposed of as municipal solid waste unless there are other laws or regulations limiting such disposal (such as for lead acid batteries). However, these wastes may include chemicals or constituents that can pose a risk to human health and the environment if not managed appropriately. Communities and other entities throughout the state have organized voluntary efforts to collect HHW to reduce the volume of these products disposed in municipal waste landfills and to reduce the likelihood that they will be disposed improperly. These collection programs bring in HHW materials that can be reused for their intended purpose or that are recycled, processed, or disposed of as hazardous waste. These rules establish the requirements for the collection of HHW and other wastes through such programs.

The original rules for HHW collections were adopted in 1988 as joint rules between the Texas Water Commission (TWC) and the Texas Department of Health (TDH). At that time the TWC had jurisdiction over hazardous waste, and the TDH had jurisdiction over municipal solid waste. After jurisdiction for all solid waste was transferred to the commission, the rules were revised in 2001 primarily changing references from the two former agencies to the commission. Because the name of the commission subsequently changed, the name is updated as needed through-

out the rules. Because of the extent of the reorganization and revisions to the previous HHW rules, the commission repeals the previous requirements and adopts new rules in replacement. This rulemaking adopts the new, revised, and continued provisions for HHW collection activities.

Various approaches are used to collect HHW. Some entities organize one-time or recurrent events where residents may bring their HHW for collection and proper reuse, disposal, or processing. Others have special vehicles that can pick up the wastes from individual households. Other entities have permanent collection facilities open for various days and hours year-round where individuals can bring their HHW for reuse or shipment for proper processing or disposal. Some entities offer as much HHW for reuse as possible, while others focus entirely on aggregating the wastes for disposal or processing. In the 20 years since the rules were first promulgated, new approaches and methods for these collections have developed, which were not covered in the previous rules.

To identify issues that should be addressed in the rule revisions, the commission requested open input from any interested parties on the previous rules prior to drafting revisions. The only stakeholders who provided input were entities involved with HHW collection programs, but there was not consensus in the input that was provided. Some stakeholders requested significant changes to the rules, but other stakeholders indicated that only minor changes should be made. Some issues from stakeholders and other issues identified by the commission in administering the program are addressed in the revisions to the rules.

One development in HHW collection programs is the use of mobile collection units to hold collection events in areas convenient to the public rather than at a fixed facility. A mobile collection unit is a vehicle, trailer, or both that can be moved to different locations and that is designed to facilitate the acceptance, classification, storage, and transport of HHW. The previous rules did not contemplate or address the use of such mobile units, and some stakeholders indicated that various provisions should be added. The adoption specifies the requirements that are applicable to mobile collection units, with changes from the proposal based on public comment.

A second development that some stakeholders indicated should be addressed in the rule revisions is satellite collection areas, which are small fixed facilities that are located in places convenient to the public. While there are no collection programs in Texas using satellite collection areas currently, some stakeholders indicated that they would like provisions to be added for such sites, as either manned or unmanned drop-off stations for HHW. The adopted amendments allow for manned stations as permanent collection centers, but unmanned stations present significant risks and are not allowed under the previous or the adopted rules. Without staff on site to ensure that incompatible wastes are properly separated and stored and to ensure that open or leaking containers are properly secured, unmanned drop-off stations present significant risks to the public and the environment. Because manned stations are the same as permanent collection centers, the adopted rules allow these facilities to be subject to the same requirements as any other permanent collection center. Based on public comment, the rules are changed at adoption to allow consolidation of wastes among operators.

The commission's rules address only the collection of wastes from households. Some stakeholders asked that HHW programs be allowed to accept hazardous waste from conditionally exempt small quantity generators (CESQGs). CESQG waste is hazardous waste generated in small volumes that is exempt from the disposal and processing requirements for hazardous wastes so long as the waste generator meets certain conditions to maintain the exemption. Like HHW, hazardous waste from CESQGs can be placed in the normal municipal solid waste stream for disposal in a landfill (if accepted by the landfill), although it may include small amounts of acutely hazardous waste, which may be more hazardous than materials generally present in consumer products. Currently, HHW collection programs must prohibit the acceptance of any hazardous wastes or any Class 1 wastes from industry. Allowing HHW operations to collect hazardous waste would not be appropriate for HHW programs that operate under the limited oversight by the commission. The commission is not changing this prohibition because this rule change would require expanding the scope of HHW activities to include commercial, industrial, and hazardous waste activities and the amending other parts of Chapter 335 that are not covered in this rulemaking. To meet other requirements in this chapter for accepting CESQG wastes, HHW facilities would need to be permitted by the commission.

In addition to updating and reorganizing the rules for the HHW program, the commission adopts certain other changes as well. Based on stakeholder input, the changes shorten the deadline for notifying the agency of collection activities to 45 days, rather than 90 days, in advance of starting a collection. This decreased notice time should provide sufficient time for the agency to review notifications and should allow HHW collection planners greater flexibility. The commission is eliminating the requirement that a detailed operational plan be submitted to the agency in advance of HHW collection activities. Rather, the commission requires that HHW operators prepare and implement a detailed operational plan, and make the plan available for agency review upon request. There is certain information previously required for operational plans that the agency will need to continue to review. The commission incorporates this information into the new notification requirements. The time in advance that HHW programs need to determine this information is not changed because the new deadline for notifications is the same as the previous deadline for operational plans (45 days).

Another adopted change is to provide more emphasis and specificity to the training requirements for people involved in HHW collections. By statute, the HHW rules must cover training requirements, but there has been some confusion in the regulated community on what training is actually needed. The commission is amending the rules to make the requirements clearer for the content of the training and the connection of certain training to specific job functions. Based on public comment, changes to the rules are made at adoption for the training requirements, as discussed below.

SECTION BY SECTION DISCUSSION

The title of Subchapter N is changed from "Household Materials Which Could be Classified as Hazardous Wastes" to "Household Hazardous Wastes." In the two sections of the Texas Health and Safety Code that require that the commission provide rules for HHW collections, these two phrases are used as the title of the sections. Because "Household Hazardous Waste" is the term most often used in Texas for this waste, the use of this term throughout the rules provides clarity and consistency.

Where appropriate throughout the rules, the amendments add the term "reuse" to the types of activities covered by the provisions because this activity is included in the rules. "Reuse" refers

to the use of a product received in an HHW collection for its intended purpose, rather than recycling or disposing the material. "Recycling" in the rules refers to the use of a waste as the raw material for a new product or to the burning of a waste as a fuel for energy recovery.

Because of the distinction between the definitions of "disposal" and "processing" in Chapter 335, the term "processing" is added where appropriate throughout the rules to the parts in the previous rules that relate to disposal. The term "disposal" in the rules refers to the placement or discharge of wastes to land or water (such as in a landfill or injection well). The term "processing" in the rules refers to the proper treatment or destruction of the material to eliminate its hazardous properties or reduce its volume (such as incineration or burning for energy recovery). Where needed grammatically in the rules, the verbs "dispose" and "process" are used in place of "disposal" and "processing" respectively, for the same reasons. The addition of "processing" in the rules is for clarity rather than to expand the rules. The previous rules included processing in the requirements for disposal.

Where appropriate throughout the rules, the amendments change "and/or" to other grammatical constructions. Where appropriate throughout the rules when needed to clarify that any combination of listed items, actions, etc. are covered by a rule provision, the words "and" and "or" are also changed to other grammatical constructions. The use of the alternative constructions is meant to clarify the full coverage of a provision that might otherwise not be clear to the regulated community, without resorting to usage of "and/or" per the standards of the *Texas Legislative Council Drafting Manual*.

Where appropriate throughout the rules, the words "shall" and "must" are changed to be consistent with the standards of the *Texas Legislative Council Drafting Manual*. The word "shall" is used to indicate an obligation or requirement for a specific person. The word "must" is used to denote a condition precedent, such that the person or thing specified does not meet the applicable designation or requirement unless the condition is met. Where needed, this issue is discussed further for the specific instances in the discussion below.

Permits for hazardous waste facilities specify the types of materials that the facilities can receive and handle. The permits are protective of human health and the environment, so additional requirements in these rules are not needed. When used in the previous rules, the phrasing "authorized by the commission" is changed in the adopted rules to "authorized" in order to avoid any confusion that the rules do not allow HHW to be shipped to other states; facilities in other states still need to be authorized, but their authorization is not from the commission. Because the receiving facilities must also agree to accept the HHW prior to shipment, the phrasing "that have agreed to accept the wastes" is also added in the same places in the rules to clarify that the hazardous waste facilities must agree in advance to accept the HHW.

The original HHW rules were promulgated prior to the development of universal waste rules by the EPA and the commission, and no reference to these rules were added during the revisions made in 2001. Because a limited variety of HHW is allowed to be shipped as universal wastes, the commission adds throughout the rules, where it is specified that HHW must be shipped using a uniform hazardous waste manifest, a new provision that HHW can be shipped as universal waste if allowed under the Universal Waste Rule in Chapter 335, Subchapter H, Division 5.

§335.401. Purpose and Applicability.

The commission adopts new §335.401 to establish the purpose and applicability of Subchapter N of Chapter 335. Texas Health and Safety Code, §361.029 and §361.429 require the commission to provide rules and to set standards for HHW collection programs, including the training of personnel. This subchapter establishes the requirements for those who collect; aggregate; offer for reuse, recycle, transport, process; or dispose of HHW. New §335.401(a) includes "aggregate," "offer for reuse," and "transport" to the list of activities covered by this subchapter, because these activities have been and will continue to be regulated by the subchapter, and clarifies that any combination of the activities is covered.

In new §335.401(b), the commission adopts that the requirements of Subchapter N apply to persons who collect, aggregate, or store HHW for offering for reuse, recycling, processing, or disposal; provide a point of generation pick-up service; operate a mobile collection unit; operate a collection event; operate a permanent collection center; transport aggregated HHW; own or operate a hazardous waste processing, storage, or disposal facility receiving HHW from the public or households; or engage in any combination of these activities. The revisions change the former provisions in previous §335.405 in the following ways: 1) by specifying that any combination of activities is covered; 2) by adding "store" after "collect" and "aggregate," adding "offering for reuse" before "recycling, or disposal," and inserting "processing" between "recycling" and "disposal"; 3) by adding "operate a mobile collection unit"; and 4) by changing the previous "transport any hazardous waste required by this subchapter to be manifested" to "transport any aggregated household hazardous waste." In each case, both the previous and adopted rules regulate these activities, so the changes are made for clarity. The change in regards to transportation is made because HHW transported by point of generation pick-up services and by mobile collection units or transported as universal waste (if allowed) does not need to be manifested, but its transport is still regulated under these rules.

The adoption also specifies that only hazardous waste processing, storage, or disposal facilities that receive HHW directly from the public are covered by this subchapter. The commission removes the previous provisions for hazardous waste facilities that receive HHW from collection programs because hazardous waste permits provide adequate oversight for the handling of HHW. Processing, storage, or disposal facilities that receive HHW directly from households are only required to report to the commission the amounts received from households (rather than collection programs).

In new §335.401(c), the commission adopts several exclusions for certain types of operations. The requirements of Subchapter N do not apply to collection programs that collect any combination of batteries, used oil, and paint, as long as no other HHW is collected. These types of collections are often called battery, oil, paint, and antifreeze collections. Because these materials generally do not present substantial hazards in collections, there is no need for additional regulation of these activities by themselves. The collections often take materials that do not normally have characteristics of hazardous waste, such as antifreeze and tires, which do not significantly increase the hazards associated with collecting the materials. Based on public comment, the term "antifreeze" is added at adoption to the list of materials that can be accepted under the exclusion; although antifreeze is generally not HHW, the addition clarifies that this waste stream can

be accepted even if it does have a characteristic of hazardous waste. The new exclusion expands the previous exclusion for collections of used oil or lead acid batteries.

The commission adopts a new exclusion that the requirements of Subchapter N do not apply to collection programs that receive *de minimis* amounts of HHW (i.e., collection of less than 100 pounds of HHW per year). Because the amounts involved are about the same as might be expected from a household, the collection does not present any more risk than normal household disposal of HHW.

The commission adopts a new exclusion that the requirements of Subchapter N do not apply to retail businesses that take wastes from customers that are similar in nature to the products sold by the business. Some retailers, such as those selling lead acid batteries, are required by law to accept back from customers used products. Other retailers, such as many that sell motor oil, offer such services to their customers. Because these programs accept limited varieties of waste from many sources (households, businesses, government, etc.) which could conflict with the prohibition in these rules from accepting hazardous waste along with HHW, these programs should not be subject to these rules. The limited variety of wastes avoids much of the potential risk from general HHW collections, and the risks from used products are generally similar to those for new items in stock so there is little risk from retailers handling such wastes.

The commission adopts a new exclusion that the requirements of Subchapter N do not apply to collections primarily intended to receive wastes from agricultural operations that also take incidental amounts of HHW, if there is no fee charged for taking wastes and if registered transporters are used to take the collected wastes to hazardous waste processing, storage, or disposal facilities. The commission is not adding a provision for pesticides shipped as universal wastes because this addition would make this exclusion too broad. The collections are generally held in or near rural areas for farmers and others involved with agriculture. In many cases, household wastes from farms are brought with the wastes from agricultural operations, and their acceptance does not present any increased risk for the collection activities.

The commission adopts a new exclusion that the requirements of Subchapter N do not apply to the collection of used electronics for reuse. When electronic items are received for later evaluation of whether they are still useful and are handled in a manner that does not break them, these materials are not HHW. The exclusion is adopted because of some misunderstanding of this issue in the regulated community.

In new §335.401(d), the commission provides that the executive director may waive the requirements of this subchapter when necessary during emergencies or disasters. This provision anticipates occasions, such as flood and hurricane recovery efforts, when immediate action is required to safely collect HHW for appropriate processing or disposal. During emergency responses, there is not time available for submitting notifications and developing operational plans weeks in advance of collecting HHW. The disruption of trash collection services that often occurs in such circumstances may inhibit citizens' abilities to dispose of HHW appropriately and may increase risks of improper storage or disposal. This change provides for suspending any parts of the rules by the executive director in any extraordinary circumstance where this action is needed to protect human health and the environment.

§335.402. Definitions.

The commission adopts new §335.402 to establish definitions of terms used in Subchapter N. For clarity, language is added to the introductory paragraph of the section to note that the definitions in 30 TAC Chapter 3 and §335.1 apply to Subchapter N. The previous definition of "aggregate" is expanded to include the different types of HHW programs defined in the rules and to include reuse as an option for disposition of collected HHW.

The previous definition of "collection center" is divided into new definitions of "collection event" and "permanent collection center" based primarily on whether HHW is stored for 48 hours or longer to allow distinctions between these types of programs in the rules because of the greater risks associated with longer term storage. As used in Chapter 335, the term "storage" includes, for one-day collection events, the time between the start of filling a shipping container and its being transported. Although this period is generally much less than 24 hours for one-day collections, the period of "less than 24 hours" was proposed in the definition of "collection event" to allow flexibility to conduct very large or very long one-day collection events by ensuring sufficient time to package collected wastes for transport. Based on public comment, the commission is changing the definitions at adoption to allow a 48-hour period for a collection event to complete its work, as discussed below in the Response to Comment section.

The previous definitions of "collector," "hazardous waste processing, storage, and disposal facility," and "household" are retained in the new rule. The previous definitions of "division" and "recurring collection program" are not included in the new rule because these terms are not used in the revised rules. The previous definition of "hazardous household waste" is changed to "household hazardous waste," to reflect common usage, and is based on the exemption provided in 40 CFR §261.4(b)(1). The term can be used interchangeably with the term "hazardous household waste," as noted in the definition.

The revisions add a definition for "inclement weather" to clarify that collections need to be prepared for severe weather, high winds, and temperature extremes, rather than just minor rain events. A new definition of "mobile collection unit" is adopted to allow this type of collection program under the rules.

A new definition for "operator" is adopted because the definition of this term in §335.1 is limited to operators of hazardous waste facilities; however, because the term is also used in the revised rules for operators of hazardous waste processing, storage, or disposal facilities, the definition also incorporates the definition from §335.1 when the context clearly refers to operators of hazardous waste processing, storage, or disposal facilities. The commission adopts a new definition for "personnel" because the definition of this term in §335.1 is limited to hazardous waste and industrial solid waste facilities, which do not include HHW operations; similar to the definition in §335.1, the definition includes all operator staff, contractor staff, and volunteers at an HHW facility whose duties could have a direct impact on compliance with this subchapter. A new definition of "point of generation pick-up service" ensures clarity of the use of the term in the rules; the definition covers all collections done by an operator where HHW is received directly from residents at households or is left out for collection at households (as opposed to being brought to a central location by individuals).

§335.403. General Requirements for Household Hazardous Waste Collections.

The commission adopts new §335.403 to establish the general requirements for HHW collections. In new §335.403(a), the commission mandates that, except for an owner or operator of a hazardous waste processing, storage, or disposal facility, no person can engage in activities regulated by this subchapter without first submitting a notification to the executive director.

In new §335.403(b), the commission adopts provisions for the required notifications. Using a form provided by the commission, an operator must submit a notification to the executive director 45 days prior to starting HHW collection activities and must resubmit a notification for on-going collection operations whenever information in the previous notification changes. At adoption in response to comments, the commission is changing the proposed requirement that an original signed notification must be submitted in order to allow electronic versions or facsimile transmittals of notifications (i.e., signed notifications that are not original copies); this change will provide additional flexibility for HHW programs in the manner in which notifications are submitted. In response to public comments, the commission adds at adoption that inclement weather dates must be provided on notifications if applicable.

The commission specifies that separate notifications be submitted for each collection location to be used, but that multiple collections at a single location may be covered in a single notification if all information is the same other than the dates. Because multiple locations on a single notification could make it difficult to determine which information pertains to each site, the commission is limiting the multiple entries on a single notification to the part of the notification where the multiple entries have been provided most commonly in the past (i.e., multiple dates). The commission requires that a notification include: 1) the identification of the operator and contact person and contact information for each; 2) the dates and hours of operation, as well as inclement weather dates if appropriate; 3) both the address of the property and location of the collection site on the property for collection events, permanent collection centers, and collections using mobile collection units; 4) for point of generation collection units and mobile collection units, the address of the collection event, permanent collection center, or registered hazardous waste transporter facility where the collected wastes will be delivered or a statement that the aggregated HHW will be transported to a processing, storage, or disposal facility (for cases where a registered hazardous waste transporter will take the HHW at the point of collection); 5) the name of the owner of the property to be used for holding collections, and an attached letter granting permission for use (signed by the landowner or his designated representative); 6) areas to be served by collection activities; 7) types by waste category of materials expected to be collected; 8) for permanent collection centers (including any sites where HHW is stored for 48 hours or longer) a properly completed TCEQ Core Data Form attached; and 9) the planned disposition of collected materials, including the name, address, and EPA identification number for each transporter to be used and each hazardous waste or recycling facility that is planned to receive the wastes collected. The commission is changing at adoption the wording of §335.403(b)(5) to cover delivery of HHW to a registered hazardous waste transporter's facility, in addition to a permanent collection center or collection event. For clarity, additional language is added at adoption to the end of the same paragraph to specify that the statement about HHW being transported to a hazardous waste processing, storage, or disposal facility pertains to cases where registered transporters take the HHW from the collection sites.

For consistency, at adoption the commission is removing from §335.403(b)(6) the phrase "if the owner is different from the operator" such that letters of permission to use a property must be submitted with every notification. The letters must be signed by the landowner or his designated representative. In response to comment, the commission is changing at adoption the period of 24 hours in §335.403(b)(9) (Item 9 previously mentioned) to 48 hours, as discussed further in the Response to Comments section.

The elements of previously required notifications are retained in the revised notifications. The hours of operation of HHW collections and facilities are added to the notification because this information is needed for the commission's oversight of these programs. The address of the collection site, the on-site location of the collection area, the geographic area covered by the collection, the types and approximate amounts of HHW expected, information related to the disposition of aggregated wastes (with the addition of the address for any transporter to be used), and documentation of financial assurance for non-governmental entities conducting HHW collections are moved from the operational plan to the new notification because the commission continues to need to receive this information although the operational plan will no longer be submitted routinely. The TCEQ Core Data Form is added to the information submitted by permanent collection centers (including sites where HHW is stored longer than 48 hours) so that these facilities can be entered into the commission's Central Registry. Documentation of consent of the landowner or their authorized representative to use property not owned by the operator is added to ensure that landowners are aware of and allow the waste collection activities, because cooperation with the landowner may be needed should contamination or other situations require emergency response, corrective action, or other arrangements. The previous requirements that notifications cover the conceptual organization for the collection efforts and details on public information and education efforts are deleted.

In new §335.403(c), the commission requires that owners or operators of private permanent collection centers provide financial assurance along with their notification of operations. The financial assurance mechanism will be required to be an original signed version of a mechanism that is acceptable to the executive director. Prior to filing a notification, operators of non-governmental permanent collection centers are required to provide sufficient information to the executive director to allow the agency to determine an acceptable amount, format, and type of financial assurance. Operators, other than governmental entities, may not operate permanent collection centers without having financial assurance in place. At adoption, the commission is inserting "center" after "permanent collection" in the first sentence of this subsection; this word was inadvertently omitted in the proposed rule.

In §335.403(d), the commission retains the following operating parameters for HHW collections: 1) the requirement that an operational plan be developed prior to and followed during HHW collection activities; 2) the prohibition against HHW collections accepting hazardous waste or Class 1 industrial waste (the latter term is changed to "Class 1 waste" to be consistent with the definition in §335.1); 3) the requirement that wastes be processed or disposed of only at hazardous waste processing, storage, and disposal facilities that have agreed to accept the wastes; and 4) the requirement to have aggregated HHW from a permanent collection center or collection event transported only by a registered hazardous waste transporter (a provision is added for shipping HHW as universal waste if allowed under the universal

waste rules) to a hazardous waste processing, storage, or disposal facility. In response to public comment, the commission is changing §335.403(d)(3) and (4)(A) at adoption to provide for consolidation of wastes among operators, as discussed further in the Response to Comment Section. A requirement was proposed that HHW collected by a mobile collection unit or point of generation pickup service must be delivered to a permanent collection center or collection event or must be transported by a registered hazardous waste transporter; at adoption, this provision at §335.403(d)(4)(B) is expanded to include delivery to a registered hazardous waste transporter's facility.

The commission removes the requirement that operational plans be submitted to the commission and, instead, specifies that HHW programs must follow their plans during collections and use the plans in training individuals who work at the collections. The commission continues requiring the one-year records retention for HHW collections, but rewords the language for clarity. Because the amounts of wastes collected must be reported to the legislature annually, the commission adds annual reporting requirements for all waste collections covered by this subchapter; at adoption based on public comment, the commission is changing the proposed deadline of February 1st for the previous calendar year to April 1st. The rule requires the use of forms provided by the commission for the reports in order to ensure consistency in the reporting.

Hazardous waste processing, storage, or disposal facilities are subject to permitting requirements that are protective of human health and the environment. In order to accept HHW, their operating permit must allow this activity, although the permit does not need to specifically state that HHW can be accepted. Because the permit process provides sufficient oversight for these types of facilities on how HHW is handled on-site, the commission in new §335.403(e) specifies that hazardous waste processing, storage, or disposal facilities that accept HHW directly from the public are subject only to the reporting requirements of this section, as long as their operating permits allow HHW to be accepted. In order to clarify that the operating permit of the hazardous waste processing, storage, or disposal facility does not need to specifically state that HHW can be accepted, at adoption the commission is changing the phrase in the proposed rule "authorized in their operating permit" to "authorized by their operating permit." The hazardous waste facilities can accept HHW unless their operating permit prohibits this action.

§335.405. Operational Plans.

The commission adopts new §335.405 to establish detailed requirements for developing, revising, retaining, and following operational plans for HHW collections. The purpose of an operational plan is to ensure both that a collection is properly planned and conducted and that personnel are properly trained on the plans and procedures for the specific collection. The commission retains the previous requirement that any person collecting HHW develop and maintain an operational plan, and the commission adds provisions both that the operational plan must be maintained in certain locations and that the operational plan must be provided to the executive director upon request.

The commission retains the requirements that operational plans contain certain information, but there are some changes on the specific information required. The expected types and amounts of HHW and other household wastes proposed for collection were previously required and are still needed for efficient planning of HHW collection operations; this information is still required in the operational plan, as well as covered in the notification. The commission adds a requirement in §335.405(a)(2) that an operational plan must describe the types and amounts of HHW that will be accepted by or transferred to a collection event or permanent collection center after collection by a mobile collection unit, a point of generation collection service, or another permanent collection center unless the collections are conducted by a single operator; this provision is intended to require coordination among different operators for the proper transfer of HHW between operators. In response to public comment, at adoption the commission adds wording to §335.405(a)(2) to allow for consolidation of wastes among operators. The requirement to cover the minimum number of personnel needed for conducting HHW activities and their functions is retained with clarification that this provision applies to operator's staff, contractors, volunteers, etc., but the previous requirement for information on their qualifications is changed to an explanation of how the training requirements that apply to their functions have been or will be met.

The commission retains the previous requirements that the operational plans include information on planned disposition of collected wastes, and requires the consideration of an expanded hierarchy of processing and disposal options ranked by their relative environmental benefit. The hierarchy is expanded to include the reuse of a product for its intended purpose as the most environmentally beneficial option because such use removes the need for processing or disposal and reduces the need for manufacturing new product; reuse is split from and placed above recycling in the new hierarchy because of the greater benefits. The hierarchy is expanded to include recycling for energy recovery as the third-level option because it is less beneficial than reuse for the intended purpose or recycling to make new products but more beneficial to the environment than the other processing and disposal options. The other previous processing and disposal options are retained but renumbered in the new hierarchy in the same order of decreasing benefits as in the previous hierarchy.

The requirements for operational plans continue to include detailed procedures to avoid accepting hazardous waste and Class 1 waste and the methods used to classify and control wastes received, but with new lists of certain issues to be covered in each of these discussions. The procedures to ensure that prohibited wastes are not received must include the screening procedures for collection participants, the questions that will be asked of the participants to screen wastes, and the quantities or types of wastes that would require further explanation prior to acceptance. Because many businesses use consumer products that are also used by households and because there may be a financial incentive for non-household businesses to try to deliver their waste to these collection events, a variety of methods is needed to ensure that hazardous waste or Class 1 waste is not received as HHW.

In order to allow for sufficient planning and training for HHW collections to be conducted safely and efficiently, the discussion of methods used to classify and control wastes must cover the following: 1) the waste streams that will be accepted and rejected; 2) the types of shipping containers and storage areas for each waste stream; 3) the methods used to categorize waste prior to packaging for shipment and processing or disposal; 4) the methods used to handle and identify unknown wastes; 5) bulking procedures, if any would be used; 6) procedures for handling containers that are leaking, unsealed, or contaminated externally when received; and 7) procedures for wastes with special handling and processing or disposal needs, if any would be accepted. A non-exclusive list of certain common wastes with

special handling and processing or disposal needs is included in the rule for the convenience of the regulated community.

The commission retains coverage in the operational plans of contingencies for inclement weather, but with clarification of types of weather to be covered. Historically, most operational plans have discussed personal rain gear or tents for rain protection and shade. However, "inclement" means "severe," so plans for more extreme weather are supposed to be covered under the rules. Because protection from rain, wind, extreme temperatures, and severe storms can be important to conducting collections safely, the rule lists all of these types of weather for inclusion in the discussion.

The commission adds a requirement that operational plans discuss in detail recordkeeping for wastes received and sent for proper processing or disposal. The previous and adopted rules have requirements for recordkeeping under provisions for temporary storage, so this part of a new operational plan must discuss how the requirements will be met.

The new rule for operational plans drops the requirement for an area map because those involved in the collection should be familiar with the area. The commission retains the previous requirement for a site map to be attached to an operational plan, and requires the depiction of improvements, boundaries, traffic flow, unloading points, emergency vehicles location, and classification and storage areas. These are the salient features that are most useful for the site maps. The maps are useful in depicting how a collection site will be arranged and run for planning and conducting collections and for training staff. The term for the map in the rules is changed from "planimetric map" to "site map" for clarity and because the commission recognizes that having topographic features on the maps could be beneficial in some respects, such as planning for spill responses and evacuations.

The commission retains the requirement for an attachment to the operational plan covering evidence of competency including experience and qualifications of key personnel, but requires that copies of training records be included. Because certain training is required for specific job functions and specific knowledge is needed to conduct collections safely, it is important that a mechanism be in place to allow efficient evaluation of whether all the training requirements are covered for a collection. Having the training documented in the operational plan will allow collection programs to monitor this issue easily. In response to public comment, the commission is changing at adoption the word "certificates" in §335.405(a)(9)(B) to "records" to allow records other than certificates to be used to document training.

The commission replaces the previous provisions for a detailed discussion of safety, spill and fire response, and related topics with a required attachment of a health and safety plan, including a non-exclusive list of specific elements. The requirements in the previous rules related to safety are reflected in the new health and safety plan with additional detail provided for clarity concerning the required detailed discussion on safety, fire control, and spill response. The inclusion of these provisions into a single health and safety plan will allow easy reference during planning, training, and emergencies. The new health and safety plan attachment is required to include at least the following information: 1) the location and contents of first aid kits at sites and in collection vehicles; 2) the location and types of telephones or radios for summoning emergency assistance and specific instructions for their usage; 3) detailed procedures for avoiding and responding to spills of liquid and solid materials, including specific information further discussed; 4) preparation and response procedures for fires, including specific information further discussed; and 5) the timing and content of training to be provided to persons before their participating in the collection of wastes.

The commission requires that the detailed discussion of procedures for avoiding and responding to spills of liquid and solid materials must include at least the following information: 1) who will respond to different sizes and types of spills (including onsite staff, emergency responders, contractors, etc.); 2) detailed methods to be used for avoiding, controlling, and cleaning up spills; 3) decontamination procedures for people and equipment; 4) processing or disposal of contaminated materials and other wastes from the spill response; 5) the types of engineering controls and personal protective equipment available on site and procedures for proper selection and use during spill responses; 6) types and location of equipment and materials available on site; 7) the duties of specific personnel or job functions; 8) evacuation procedures (including at least the collection site and, if appropriate, the surrounding area); and 9) procedures for reporting spills to local, state, and federal authorities. In response to public comment, the commission added flexibility for showing the duties of specific personnel by adding the phrase "or job functions" to §335.405(a)(9)(C)(iii)(VII) so that staff can be used in different capacities as needed. However, because some duties require certain training, the commission notes that programs that choose to list the duties by job function must consider the training requirements when assigning staff, contractors, volunteers, or others to certain job functions.

The discussion of preparation and response procedures for fires must include at least the following information: 1) the location and types of fire extinguishers and other fire suppression equipment available on site and on collection vehicles; 2) when onsite fire equipment would be used and when the fire department would be summoned; 3) evacuation procedures (including at least the collection site and, if appropriate, the surrounding area); 4) the identity and storage location of any materials to be collected that might need special fire-fighting methods (such as flammable liquids and metals, explosives, compressed gases and aerosol cans, water reactive materials, etc.); and 5) the availability of a local fire department and whether they can handle the maximum fire potential from the anticipated collection on their own or through established mutual aid response arrangements.

The health and safety plan must cover the timing and content of training or briefings on safety for staff and volunteers before they participate in collecting wastes. The content of this training must be specific to the duties to be performed.

In new §335.405(b), the commission specifies that the operational plan must be available at the collection event or permanent collection center covered by the plan and at the offices of the entity operating the collection program. The operational plan is to be used for training staff, planning, and conducting collections. The operational plan is to be maintained for as long as collection events are planned and for at least one year after a collection event, after a permanent facility closes, or after other types of HHW activities cease.

In new §335.405(c), the commission requires that the operational plan be provided to the executive director upon request in lieu of the previous requirement that all operational plans be submitted to the commission before collections.

§335.407. Training Requirements.

The commission adopts new §335.407 to cover training requirements for persons involved with HHW collections and reuse operations. The section covers the general types and the timing of training.

The commission specifies in new §335.407(a) that the operator is responsible for ensuring that training appropriate to their duties is provided to all individuals involved in any waste collection, that the training is specific to the HHW operations being conducted, and that training is provided to all individuals involved with the collection, aggregation, storage, and transport of HHW and with offering materials for reuse. The training is specified as any appropriate combination of training courses as well as the operational plan for program-specific training.

New §335.407(b) requires operators to ensure that the appropriate level of training is provided before individuals collect, aggregate, store, or transport HHW for reuse, recycling, processing, or disposal. Operators are required to ensure that all training requirements are met for individuals performing specific job duties. Operators are required to ensure that volunteers are appropriately trained on the site rules and safety issues before assisting with a collection.

In new §335.407(c), the commission specifies that the training must cover any applicable training requirements in federal and state laws and regulations, including federal Occupational Safety and Health Administration (OSHA) requirements related to handling hazardous materials, responding to spills, and other activities, the Texas Hazard Communication Act, United States Department of Transportation (DOT) requirements for preparing and packaging wastes for transportation, and EPA rules for training of personnel at hazardous waste facilities. New §335.407(d) requires that operators ensure that individuals are trained under this chapter as if HHW were hazardous waste, such as using Hazardous Waste Operations and Emergency Response (HAZWOPER) courses although they apply to hazardous waste rather than HHW. At adoption, the phrase "after it is unloaded from vehicles delivering it from households and before it is segregated for transport or storage" is added to §335.407(d) to specify that the training requirement only applies to those that handle the waste after it is unloaded at a collection.

§335.409. Operation of Collection Events and Permanent Collection Centers.

The commission specifies in new §335.409 the operational requirements for permanent collection centers and collection events. Most previous requirements are retained, in some cases with changes or rewording, but reordered to reflect the order in which actions generally occur.

New §335.409(a) retains the previous requirement for operators to site, organize, and operate collections in a manner that protects the environment and safeguards human health, welfare, and physical property. The previous requirement is retained that operators select locations suitable for the types and quantities of wastes to be collected. Because of the public health and environmental risks associated with incompatible chemicals in close proximity and with public exposure or environmental impacts if wastes are packaged in an uncontrolled area, the previous requirement that wastes be sorted upon receipt and placed into a controlled waste packaging area whenever possible is changed. The new rules make these requirements mandatory for all collection events and permanent collection centers by removing the wording "whenever possible" - under the revised rules, only sites that allow safe handling and processing of wastes upon receipt can be selected. The previous requirement is retained that operators provide a controlled access area for sorting, packaging, and handling wastes accepted. The commission expands the previous requirement that operators provide parking by also providing that the queuing of vehicles waiting to unload must be done so as to not interfere with safe entry or exit of vehicles and to prevent traffic congestion. The previous requirement that operators prepare for inclement weather is retained with a specification that the preparation include provisions for sheltering personnel at or near the site during storms. The previous requirement is retained that operators must designate areas for eating, drinking, and smoking and must prohibit these activities in collection work areas. The commission changes the previous requirement that incompatible and unidentified wastes be segregated prior to packaging for transport or storage to also require segregation after packaging.

In new §335.409(b), the commission adopts provisions for personnel and training. The previous requirement that personnel at HHW facilities be familiar with the operational plan is changed to require that the operator ensure that personnel are trained to use and follow the operational plan.

The previous provision is changed that required at least one person involved in handling and packaging waste be trained and knowledgeable of waste incompatibility and qualified to package waste for transport. The revised provision requires that the operator ensure that all persons involved in these activities and those overseeing and supervising the activities on site be trained and knowledgeable of HHW incompatibility and qualified to package hazardous waste for transport. In order to ensure that waste is properly packaged and to avoid reactions of incompatible wastes, the persons with direct control over these activities while in progress need to have the requisite knowledge. Although the pertinent DOT regulations (at 49 CFR Part 171) apply to hazardous waste and not HHW, familiarity with packaging and transportation of hazardous wastes is appropriate because HHW has the same properties as hazardous waste requiring its safe transport.

The commission retains, as a responsibility of the operator, the requirement that at least one person who is trained to classify hazardous waste be utilized to accept or supervise the acceptance of waste at each HHW collection event or permanent collection center. The commission expands the previous requirement that personnel be instructed in accident prevention, responses to fires, explosions, and spills, and the use of protective devices to minimize exposure to HHW to include any other materials accepted during the collection activities that also present exposure risks and proper fire extinguisher training, and to make it the responsibility of the operator to ensure this requirement is met. There are types of household wastes that do not have the characteristics of hazardous waste (and are therefore not HHW) but that can present significant exposure risks. The previous requirement that labeling and packaging of HHW waste be supervised by a person familiar with DOT hazardous materials shipping and hazardous waste manifest requirements is retained as a responsibility of the operator.

The commission expands, as a responsibility of the operator, the previous requirement that at least one person be on site who is trained to perform general first aid and who is knowledgeable concerning safety measures used for chemical exposures. The new requirement expands the knowledge requirement to any hazardous material presented for collection (rather than only HHW) and specifies that the first aid training must be consistent

with courses provided under the auspices of a recognized national safety organization and documented with a current certificate. First aid practices improve over time and retraining reinforces knowledge, so it is important that the first responders keep their training current. Because national safety organizations that certify first aid training ensure that the training is complete, thorough, and up-to-date, these courses will provide the necessary skills for general first aid responders. The new provision specifies that a person trained on these issues must be on site whenever wastes are being handled.

The previous provision is retained, as a responsibility of the operator, that an on-site supervisor must be available and responsible for initiating an emergency response plan, for accepting any unidentified wastes, and for ensuring proper handling and processing or disposal. The commission retains, as a new responsibility of the operator, the provision that the on-site supervisor must have the authority to remove from the site and prohibit the re-entry of any person who may threaten site security or personal safety.

The previous requirement that an HHW operation must be manned by an adequate number of staff with the necessary skills and expertise to accept, sort, package, transport, and manifest the waste and to provide on-site supervision and public relations is made a responsibility of the operator and is modified by dropping package, transport, and manifest and by adding label and store. The commission makes this change to allow flexibility in operations because in some cases wastes are not prepared for shipment at the time of collection but are stored until a registered transporter comes to prepare and ship them from the facility, often at times when collections are not occurring. The commission adopts a new provision that operators ensure that an adequate number of operator or contractor staff with the necessary skills and expertise to package, transport and manifest hazardous materials be present and involved when wastes are prepared for transportation.

The commission adds a requirement that an operator must ensure that personnel who handle HHW after unloading have received chemical identification, consolidation, and segregation training and HAZWOPER training appropriate to their duties. At adoption, the commission removes the proposed requirements in §335.409(b)(10) for annual refresher training, for HAZWOPER training for supervisors of staff handling HHW, and for documentation of other training and adds the requirement for chemical identification, segregation, and consolidation training.

In new §335.409(c), the commission modifies the previous requirements for having equipment and materials present at collection events and permanent collection centers. The previous requirement that materials and equipment to provide protection, safety, and first aid for staff, to contain and clean up spills, and to properly handle, classify, and label the waste is specified as a responsibility of the operator because operators must ensure that collections are conducted properly and safely. Additionally, because wastes are not always packaged during collections, as discussed previously, the requirement that materials to package waste must be present is changed to materials for storing wastes. Because materials other than HHW may be collected and spilled and to provide clarity for whom is responsible, the previous provision that disposable cleanup materials and protective clothing used during a spill cleanup be handled as HHW is changed to a responsibility of the operator to ensure that these materials are handled as the type of material that was spilled.

The previous requirement that nondisposable equipment and materials that are used and contaminated in a spill response be decontaminated before removal from the site is changed to a responsibility of the operator to ensure that items are properly decontaminated before removal from the site, regardless of the cause of the contamination. The changes here specify who is responsible for the action and also extend the requirement to any nondisposable equipment or material that becomes contaminated, regardless of how this occurs. The risk of spread of contamination is not limited to spills, and equipment or materials that become contaminated during normal use or in other ways need to be decontaminated as well.

The commission specifies that providing equipment at collection events and permanent collection centers is the responsibility of the operator. The previous list of equipment is retained with some changes. Because this section addresses collection events and permanent collection centers, the requirement for a first aid kit for a point of generation pick-up service vehicle is moved to new §335.411(a)(4)(A). The previous requirement for a means of communication for emergencies specifies a telephone or citizen's band radio; this requirement is changed to a telephone or any type of radio because some collections have radios used by police or fire departments on site rather than citizen's band radios. The previous requirement that an eyewash, shower station, or hosing device be available is changed to an eyewash and shower station or a hosing device; an eyewash is not designed to wash contamination from other parts of a body and a shower station is not effective for washing the eyes, but a hosing device could be used for either purpose. The previous requirement for a fire extinguisher is amended to require at least two fire extinguishers that are appropriate to the types of wastes accepted. Because a chemical fire could limit access to a single fire extinguisher, having two on-site provides an additional margin of safety. The previous requirement for sufficient absorbent or containment to handle a spill of 10% of the anticipated volume of liquid waste is retained, and the applicability of this provision to point of generation pick-up service vehicles is moved to §335.411(a)(4)(D) with changes as discussed later for that section.

In §335.409(d) the commission retains with changes the previous provisions for wastes accepted and excluded. The recommendation that only household wastes be collected is retained intact. The prohibition on accepting hazardous waste and Class 1 waste is retained with a correction to the term "Class 1 waste" (i.e., dropping "industrial") to be consistent with §335.1(18). The previous provision that unidentified waste be identified by a chemist or trained individual is made a responsibility for the operator to ensure that this action occurs prior to transportation of the waste, and language is added to specify that any physical assessment must be done by qualified individuals.

The commission removes the previous requirement that announcements and promotional material must state that compressed gas or explosives cannot be brought to a collection event or permanent collection center but that these materials should be taken if brought and appropriate authorities immediately contacted. Instead, the commission specifies that the announcement and promotional material state which types of waste will be accepted and which will not. The operator is required to provide information to potential participants before a collection event or the opening of a permanent collection center and at least annually thereafter for the period that the permanent collection center is open. The commission specifies

that the information must include all relevant information on the following: 1) the types and quantities of wastes that will be accepted and that will not be accepted; 2) the instructions for the public to safely package and transport their wastes to the collection; 3) the days and hours of operation and the location of the site; and 4) who can bring wastes to the collection, as well as any other information that may be useful to the public. Because some collection programs have made special arrangements to handle compressed gases or explosives, these materials are not required to be excluded in promotional materials.

The previous requirement concerning decisions on accepting certain wastes is made a responsibility of the operator to ensure that these decisions are based on the capabilities of the personnel collecting, sorting, and packaging the waste. The previous requirements are retained that the operational plan include a generic list of proposed wastes to be accepted and that this list be developed with the intent of minimizing the need to analyze unknown wastes, but the phrase "unidentifiable wastes" is changed to "unidentified wastes" because any material can be identified if analyzed properly.

The previous provision is retained that empty HHW and pesticide containers can be disposed as nonhazardous waste if rendered unusable. The previous requirement that there be a container at the collection for nonhazardous wastes is deleted because some collection programs do not accept nonhazardous wastes. Any collection program that accepts wastes other than HHW is still required to comply with the laws and regulations pertinent to the other types of wastes that are collected, including storage and disposal.

In new §335.409(e), the commission retains the requirements for temporary storage with some changes. The previous requirements are modified to provide that the operator is responsible for storage being operated safely and for a facility being secured to control access by the public.

The commission retains the following provisions for storage of HHW: 1) HHW can be stored for ten days if more than 3,000 kilograms are aggregated; 2) storage at an authorized hazardous waste processing, storage, or disposal facility is not limited by Subchapter N; 3) the executive director may extend the ten-day period if a written request is received; and 4) HHW can be stored for 180 days if 3,000 kilograms or less are aggregated. The previous provisions are changed in the following ways: 1) to specify that extensions are requested of and provided by the executive director; 2) to add that the written requests for extension must include the reason that waste must be stored longer than ten days, the earliest date that a waste in storage was received, and the expected date that the wastes will be transported to a recycling facility or a hazardous waste processing, storage, or disposal facility; and 3) to specify that the 180-day storage period only applies to permanent collection centers rather than recurring collection programs.

The commission changes the previous labeling requirements for HHW in storage. The previous provisions appeared to be based on labeling requirements for consumer products rather than for hazardous materials in transportation from the DOT. Although simpler than labeling requirements for consumer products, the hazardous materials in transportation provisions provide sufficient information for safe storage of HHW and do not require additional labeling for HHW stored in shipping containers that are properly labeled for transport. The labels on consumer products also provide sufficient information for safe storage. Therefore, the commission will require that operators ensure the following for HHW stored in the individual containers received by the public (as opposed to materials in proper shipping containers with required labeling): 1) intact, legible, and correct labels are maintained on the individual containers with such labels (i.e., labels could not be removed, defaced, or changed); 2) if labels are missing, defaced, or incorrect on containers stored individually, as a minimum, information required by the hazardous materials in transportation regulations is marked on each container; and 3) the date received from the public is marked on any container stored individually. Further, if HHW is properly prepared for transportation and stored in properly labeled shipping containers, the commission specifies that the marking of individual containers received from the public is not required. The commission retains the one-year recordkeeping provision for HHW that is collected, but makes the retention the responsibility of the operator.

§335.411. Operation of Point of Generation Pick-up Service and Mobile Collection Units.

The commission adopts new §335.411 to specify operational requirements for point of generation pick-up services and mobile collection units. These types of collections receive HHW from the public and then usually transport the HHW to a receiving facility. Point of generation pick-up services go to households and take the wastes via direct contact with the residents or take wastes that have been left at curbside or in another prearranged location. Mobile collection units set up in a convenient location and then function similar to a collection event or permanent collection center with the public delivering the wastes to the site.

The commission provides in §335.411(a) the requirements for point of generation pick-up services. Because leaving HHW unattended outdoors for pickup presents potential hazards from spills, rain runoff, and contact by animals and children, the commission retains the requirements that operators utilizing point of generation pick-up services develop and implement a collection program that minimizes human and animal exposure to collected waste and is protective of human health and the environment and that, when the collector will not directly contact the generator of the HHW, operators are required to provide instructions to the public for properly packaging, labeling, and securing the waste. The commission changes the previous requirement to specify for clarity that the procedures provided to the public are to be specific to the wastes left out for pickup. The commission removes the specification that the requirements for these programs also apply to collectors. Because operators are in charge of the programs, collectors affiliated with the programs are under the operators' control. The commission does not intend that these provisions should apply to citizens delivering HHW from friends, relatives, neighbors, or others, so the previous application of the provisions to collectors is not needed.

To ensure that the public has sufficient information to participate safely and effectively, the commission requires operators of point of generation pick-up services to disseminate prior to collection activities information to potential participants detailing the following: 1) instructions for properly packaging, labeling, and securing the waste if it will not be personally transferred by the generator to the collector; 2) eligibility criteria for participating in the program; 3) the types and quantities of wastes that will be accepted and will not be accepted; and 4) methods to be used for arranging pickup. The new rule includes a requirement that operators of point of generation pick-up services organize and operate collections so as to safeguard health, welfare, and physical property and to protect the environment.

To ensure safety in operations, the commission requires that operators ensure that at least one vehicle is equipped with a first aid kit, an appropriate fire extinguisher, a method of communicating with emergency first responders and information needed for its use (such as instructions, emergency telephone numbers, radio frequencies for specific types of emergencies, etc.), and enough spill absorbent to clean up a spill of 10% of the maximum quantity of liquid waste the vehicle is designed to hold. The rule also requires that vehicles used for point of generation pick-up service be staffed by at least one person experienced in and trained in hazardous waste handling, fire extinguisher use, first aid, waste classification, waste incompatibility, spill prevention, and clean-up safety.

Operators of point of generation pick-up services that will accept unknown wastes are required to ensure that unknown wastes are properly identified and either to have available on the collection vehicle all testing equipment needed to identify wastes prior to placement on the vehicle and a person present who is qualified to use the equipment, or to have a way of separately isolating on the vehicle each container of unknown waste until delivery to a permanent collection center or collection event where the wastes will be identified prior to being aggregated with other wastes, as long as this is consistent with DOT regulations for hazardous materials in transportation. Because the federal rules apply to shipments larger than 1,000 kilograms and do not allow the shipment of unknown materials because of potential incompatibility issues, the second option is not available in all cases.

Because the operation of mobile collection units is similar to either a permanent collection center or a collection event depending on how long wastes are stored at the site where the collection is held, the commission requires operators utilizing mobile collection units to comply with the requirements in §335.409, as discussed previously, for the sites where collections are held. Because mobile collection units can be used to collect, store, and haul HHW, the rule also requires that these operators develop and implement a collection program that minimizes the potential for human exposure to or environmental harm from collected waste during collection, storage, and transport. At adoption, the commission changes the requirement in §335.411(b)(2) that operators using mobile collection units staff each collection with at least one person experienced in and trained in hazardous waste handling, fire extinguisher use, first aid, waste classification, waste incompatibility, spill prevention, and clean-up safety to require only one person with these qualifications in the collection program. Based on public comment, the commission changes at adoption the proposed requirement in §335.411(b)(3) that each mobile collection unit be equipped with certain safety equipment to requiring this equipment only on one mobile collection unit involved with a collection. Based on public comment, the commission changes at adoption the proposed requirement in §335.411(b)(3)(E) such that sufficient absorbent and containment is available for a spill of 10% of the liquid wastes on the largest mobile collection unit at the collection. With the changes, each collection using mobile collection units must have the following safety equipment: 1) a first aid kit, 2) an appropriate fire extinguisher, 3) an eye wash and emergency shower or a hosing device, 4) a means of summoning emergency assistance, and 5) enough spill absorbent and containment to handle a spill of 10% of the liquid waste on the largest mobile collection unit present.

Operators of mobile collection units that will accept unknown wastes are required to ensure that unknown wastes are properly identified and either to have available on the mobile collection unit all testing equipment needed to identify wastes prior to placement on the vehicle and a person present who is qualified to use the equipment, or to have a way of separately isolating on the unit each container of unknown waste until delivery to a permanent collection center or collection event where the wastes will be identified prior to being aggregated with other wastes, as long as this is consistent with DOT regulations for hazardous materials in transportation. Because the federal rules apply to shipments larger than 1,000 kilograms and do not allow the shipment of unknown materials because of potential incompatibility issues, the second option is not available in all cases. The commission intends that operators must register as a transporter to use a mobile collection unit to transport HHW to a hazardous waste processing, storage, or disposal facility, except for HHW that is properly shipped as universal waste.

The commission requires operators utilizing point of generation pick-up services and mobile collection units to comply with personnel and training requirements found in new §335.409(b), with proposed waste acceptance and exclusion parameters found in new §335.409(d), and with temporary storage requirements found in new §335.409(e). The requirements for training staff, accepting and excluding wastes, and temporary storage are all equally pertinent to mobile collection units and point of generation pick-up services as to collection events and permanent collection centers. At adoption, a change is made in §335.411(c)(4) to allow delivery to permanent collection centers, collection events, or registered hazardous waste transporter facilities.

In order to provide flexibility on how the programs operate, the commission is changing at adoption based on public comment the requirement that HHW collected by a point of generation pick-up service or mobile collection unit be delivered to a permanent collection center or collection event to be aggregated with other HHW or be transported to a hazardous waste processing, storage, and disposal facility by a transporter compliant with the requirements of §335.415. The 24-hour period in the proposed rules is being expanded to 72 hours. The previous provision allowing collection vehicles to take waste directly to hazardous waste processing, storage, or disposal facility is deleted to avoid the risks of long-distance transport of the more hazardous types of HHW by unregistered transporters. If operators wish to transport HHW that cannot be classified as universal waste directly to processing, storage, or disposal facilities, they have the option to register as transporters.

§335.413. General Shipping, Manifesting, Recordkeeping, and Reporting Requirements.

The commission adopts new §335.413 to specify shipping, manifesting, recordkeeping, and reporting requirements for persons who collect, receive, or aggregate HHW. The new section does not apply to materials offered for reuse and to wastes that are not HHW. The commission retains the requirement that persons who collect, receive, or aggregate HHW must use only registered hazardous waste transporters to ship HHW from permanent collection centers and collection events to hazardous waste processing, storage, or disposal facilities. An exception is made for HHW that can be shipped as universal waste by non-registered transporters if allowed by the universal waste rules and for cases where aggregated HHW is shipped to another permanent collection center for the purpose of consolidating aggregated HHW. The rule specifies that the transportation requirements apply to HHW shipped only from collection events and permanent collection centers because there are provisions for point of generation

pick-up services and mobile collection units to transport HHW to a collection event or permanent collection center without being registered transporters, as discussed previously. In response to public comment, the commission adds at adoption language to §335.413(a)(1) and (2) to provide for consolidation of wastes among operators.

The commission retains the requirement that collectors and operators ship HHW from a collection center or a collection event under a uniform hazardous waste manifest only to a permitted hazardous waste processing, storage, or disposal facility that has agreed in advance to accept the waste. An exception is made for HHW that can be shipped as universal waste if allowed by the universal waste rules and for cases where aggregated HHW is shipped to another permanent collection center for the purpose of consolidating aggregated HHW. The rule specifies this part as applying to HHW from collection events and permanent collection centers because there are provisions for point of generation pick-up services and mobile collection units to transport HHW to collection events and permanent collection centers without using manifests, as discussed previously. As discussed previously, point of generation pick-up service vehicles and mobile collection units are prohibited from transporting HHW to hazardous waste processing, storage, or disposal facilities unless they are registered as transporters.

The commission clarifies the requirement that persons who collect, receive, or aggregate HHW ensure that the HHW is packaged and labeled in compliance with §335.10 and DOT requirements by adding language that the other regulations are to be applied as if the HHW was hazardous waste. The commission requires persons to retain for one year all hazardous waste manifests and bills of lading (for universal waste shipments) for HHW shipments and to make them available to the executive director upon request.

The commission requires operators to submit an annual report on all wastes collected and materials offered for reuse. The commission proposed a deadline of February 1st for the previous calendar year, but based on public comment, the deadline is changed at adoption to April 1st. At adoption, the commission adds a provision requiring reporting of wastes transferred to another operator. The report must be done on a form provided by the commission. The commission requires collectors and operators to ensure that all wastes are processed or disposed of in compliance with federal, state, and local laws and regulations. This provision also states that any materials that are sent for processing or disposal after being offered for reuse need to be processed or disposed of as HHW if they would be hazardous waste except for the federal exclusion for household waste.

§335.415. General Requirements for Transporters.

The commission specifies in new §335.415 provisions for persons who transport HHW that is required to be accompanied by a universal hazardous waste manifest. The rule retains the provision that HHW that is required to be accompanied by a universal hazardous waste manifest can be transported only by registered hazardous waste transporters. The previous provisions requiring transporters to comply with §§335.4(1) - (3), 335.11, and 335.14 are modified to state that transporters must apply those requirements to HHW as if it was hazardous waste. Because the cited sections do not contain provisions for HHW, the previous language could be interpreted as not pertaining to HHW.

The commission rewords for clarity the previous requirements for transporters who conduct HHW collections. The amended requirements state that transporters operating an HHW collection program must comply with the applicable requirements for operators. The provision that transporters must keep HHW separate from hazardous waste or Class 1 waste is retained but reworded for clarity and brevity.

§335.417. General Requirements for Processing, Storage, or Disposal Facilities.

The commission specifies in new §335.417 the requirements for hazardous waste processing, storage, or disposal facilities. The rule requires that hazardous waste facilities receiving HHW comply with their permit. Based on public comment, the phrase "with a permit authorizing the receipt of household hazardous waste" is deleted at adoption from §335.417(a) and (b). Although permits for hazardous waste processing, storage, or disposal facilities authorize those facilities to take HHW, this fact is generally not specifically stated in the permit. Because this issue appeared confusing to the regulated community, the phrase is deleted at adoption. The phrase is not needed because the definition for these facilities at §335.402(4) specifies that these facilities must be properly permitted.

The previous requirements with which hazardous waste processing, storage, or disposal facilities must comply in order to receive HHW directly from the public are deleted. As discussed previously, the permitting process for these facilities provides sufficient oversight of their handling HHW. The commission adds a new requirement that hazardous waste processing, storage, or disposal facilities receiving HHW directly from the public must report to the executive director on the quantities received using the same process as any other HHW program. This change provides more complete information for the commission's required reports on wastes collected.

§335.419. Reuse of Collected Material.

The commission specifies in new §335.419 that collected materials that may be reused do not have to be managed as HHW unless they are sent for processing or disposal. The section retains the previous criteria for which materials are reusable. The entities to whom reusable materials can be given are expanded to any individual or group by replacing the previous wording "a governmental entity, institution, or other responsible party" with the word "person" which is defined in Chapter 3 as any individual or legal entity.

The commission adds language to specify that storage of materials to be offered for reuse is not subject to the requirements of this chapter. The commission intends that this clarification increase the amount of materials that HHW programs make available for reuse because this option for dealing with received materials is by far the most environmentally and economically beneficial way to handle the materials. Additionally, language is added to clarify that, if any material in usable condition not accepted by another party is sent for processing or disposal by the HHW program, it must be processed or disposed as HHW under the provisions of this subchapter if it is HHW. This provision is consistent with the federal exclusion for wastes from households from classification as hazardous waste (at 40 CFR §261.4(b)(1)).

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major en-

vironmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rulemaking to Chapter 335 is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because there are no significant requirements added to HHW collection activities. HHW collection activities authorized in Subchapter N are voluntary. While some entities may be required by a storm water permit to provide HHW collection activities to meet public outreach requirements for ensuring that toxic materials are not put into storm sewers, these rules do not require participation in HHW activities. The rulemaking action reorganizes and rewords previous requirements for HHW collection activities, streamlines the application requirements, and addresses new methods and techniques for HHW collection. The adopted rules make appropriate formatting changes, clarifications, and updates to the rules to reflect requirements of the Secretary of State for rule publication.

Furthermore, the adopted rulemaking action does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

Federal rules in 40 CFR §261.4(b) specifically exclude HHW from the definition of hazardous waste. Thus, HHW and the commission's requirements for the management of HHW are not subject to federal standards for the management of hazardous waste.

The Texas Health and Safety Code, §361.029, specifically authorizes the commission to develop rules for the collection of HHW. The commission adopts these rules consistent with this statutory authority and does not exceed an express requirement of state law.

The adopted rules do not exceed a requirement of a delegation agreement or contract between the state and an agency of the federal government because there is not an applicable delegation agreement or contract with the federal government related to these activities. Because HHW is excluded from the definition and regulatory requirements for hazardous waste, the revisions to the HHW program do not exceed a requirement of the state's authorized hazardous waste program.

The commission does not adopt these rules solely under the general powers of the agency. Rather, the commission adopts these rules under Texas Health and Safety Code, §361.029 and §361.429, which authorize the commission to develop rules for the collection of HHW.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. As discussed in the Response to Comment section, comments were received that indicated that HHW programs are not voluntary for some entities.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates that Texas Government Code, Chapter 2007 does not apply to these adopted rules because these rules implement requirements for the safe and effective management of HHW. The rulemaking is reasonably taken in response to a real and substantial threat to public health and safety, is designed to significantly advance the health and safety purpose, and does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, the rulemaking is exempt under Texas Government Code, §2007.003(b)(13).

Nevertheless, the commission further evaluated these adopted rules and performed a preliminary assessment of whether these rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of these rules is to implement changes to the requirements for the collection of HHW. The rules substantially advance this purpose by reorganizing and rewording previous requirements, streamlining the application requirements, and addressing new methods and techniques for HHW collection.

Promulgation and enforcement of these adopted rules is neither a statutory nor a constitutional taking of private real property. The rules do not affect a landowner's rights in private real property because this rulemaking action does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The rules implement a voluntary program for HHW collection. The rules do not substantially change the previous technical requirements that were in place under the previous rules. Therefore, the commission's adopted rules do not affect real property in a manner that is different than may have been affected under the previous requirements.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking does not substantially change the previous technical requirements for HHW activities and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

PUBLIC COMMENT

The proposal was published in the February 15, 2008, issue of the *Texas Register* (33 TexReg 1239). The commission held a public hearing on March 11, 2008. The comment period closed on March 17, 2008. The commission received written comments from the Brazos Valley Solid Waste Management

Agency (BVSWMA); Philips Service Company (PSC); the City of Grand Prairie (Grand Prairie); Veolia ES Technical Solutions, L.L.C. (Veolia); Upper Trinity Regional Water District (UTRWD); the City of Austin (Austin); the City of San Marcos (San Marcos); Harris County; the City of Fort Worth (Fort Worth); Houston-Galveston Area Council (H-GAC); Fort Bend County Engineering (Fort Bend); Dallas County; and the City of Houston (Houston). The commission received oral comments from Dallas County, Fort Worth, and PSC.

RESPONSE TO COMMENT

Need for Rules and Provisions

Fort Worth commented that the rule revisions are not needed if the previous rules are properly read and enforced.

The commission respectfully disagrees with this comment and did not make any changes to the rules in response to the comment. There have been developments in laws, rules, and HHW programs, such as the universal waste rules and mobile collection units, which should be reflected in the HHW rules. Confusion of previous rule requirements by some HHW programs shows a need for greater clarity in the rules. For these reasons, the commission has provided revisions to these rules.

Harris County and H-GAC commented that neither these nor the previous rules required approval of the operational plan or notification for an HHW program and that this fact should be continued in the new rules to allow flexibility. Fort Bend commented that the previous rules did not require approval of notifications or operational plans by the commission and proposed that this practice remain in the new rules.

The commission appreciates these comments and support for this part of the rules.

CESQG Wastes

BVSWMA requested that the rules be changed to allow HHW programs to accept hazardous waste from CESQGs. BVSWMA stated that the relative geographic isolation of the Brazos Valley does not allow for low-cost and convenient disposal options for small quantity generators, possibly resulting in their disposing of hazardous waste in the municipal solid waste stream. Fort Bend commented that CESQGs should be allowed to take their hazardous waste to an HHW permanent collection center for disposal on a day when HHW is not being accepted. Fort Bend commented that the CESQG waste would not be commingled with HHW, that storage time would be minimal (30 days or the same day as shipped were both mentioned), and that without such a low-cost disposal provision, wastes from CESQGs would sit in a small business, a storage shed, or other unknown locations with no way to know how these materials are disposed or when. Houston commented that the HHW rules should allow collection of materials from small businesses and suggested allowing small businesses to bring wastes to HHW facilities for a discounted fee and keeping the hazardous waste separate from HHW.

The commission respectfully disagrees with this comment. The requirements of Subchapter N are limited to activities involving wastes generated by household consumers and are based on a well known universe of materials that may be used by households. These rules are self-implementing; once a notification is submitted to the commission, the operator is required to comply with the rules. Unlike a commercial, industrial, or hazardous waste processing, storage, or disposal facility, no permit or approval is required. CESQG waste is hazardous waste. The commission is not expanding the HHW program to include hazardous waste generated by CESQGs. The commission recognizes that CESQGs are allowed to dispose (if accepted by the landfill) their limited amounts of hazardous waste in the normal municipal solid waste stream in much the same way that HHW can be disposed by households. Allowing HHW operations to collect hazardous waste would not be appropriate for HHW programs that operate under the limited oversight by the commission. If HHW programs find there is a significant need for collection of hazardous or industrial waste in their area, they have the option of seeking authorization from the commission as hazardous or industrial waste facilities or of working with other facilities in their area to provide alternative disposal options for CESQG wastes consistent with the hazardous and industrial waste regulations in Chapter 335. The HHW rules would not preclude arrangements an operator might make with CESQGs to provide disposal options for their wastes as authorized under the industrial and hazardous waste regulations in the rest of Chapter 335.

Austin commented that the prohibition on accepting hazardous waste from CESQGs should be removed and note that the EPA has for some time encouraged HHW programs to take hazardous waste from CESQGs. Austin stated that they have been taking hazardous wastes from CESQGs for a number of years and that the commission provided grant funds previously for this purpose.

The commission has not made any change to the rule based on this comment. The commission recognizes that the EPA encourages HHW programs to accept hazardous waste generated by CESQGs when this action is consistent with state regulations for these programs. However, the commission's HHW rules have prohibited taking any hazardous waste or any Class 1 waste from industries since promulgation in 1988. Allowing HHW operations to collect hazardous waste would not be appropriate for HHW programs that operate under the limited oversight by the commission.

Other Wastes

San Marcos, H-GAC, and Fort Bend commented that antifreeze was not included in the exempted materials in §335.401(c)(1), although it is often collected along with the materials listed. San Marcos, Houston, H-GAC, and Fort Bend requested that antifreeze be added to the exemption. Harris County commented that antifreeze was left out of the exclusion and stated that antifreeze poses low environmental risk.

The commission agrees with these comments in part and at adoption is adding "antifreeze" to the listed wastes in §335.401(c)(1). Because new or used antifreeze does not have any characteristic of hazardous waste unless it is mixed with another material that exhibits a characteristic of hazardous waste, antifreeze itself is not HHW, and its collection is not covered by the rules, other than for the provisions that apply to non-hazardous liquid wastes. However, because the excluded collections may take antifreeze that is HHW because of contamination, antifreeze is added to the exclusion at adoption to clarify that accepting it does not make the exempted collections subject to the rules. The addition of antifreeze does not imply that other non-HHW materials (such as used oil filters, tires, etc.) are prohibited from the exempted collections.

Houston commented that antifreeze and e-waste should be clarified as not being HHW and not subject to the HHW rules.

The commission agrees in part with this comment but did not make any change to the rule based on this comment. Regarding

the issue of antifreeze, by itself antifreeze is generally not HHW as discussed above, but it is still subject to certain parts of the HHW rules if it is accepted in collection programs. Regarding the issue of electronic waste generated by households, some electronic wastes may be HHW depending on the item. The HHW rules do not apply to organizations that only collect used electronic equipment from the public for reuse as provided in §335.401(c)(5). Please note that the commission is developing rules in a separate package that directly addresses the topic of consumer computer recycling.

Fort Bend commented that there should be an exemption in the rule to allow acceptance of small quantities (such as 25 gallons) of abandoned wastes by a permanent collection center.

The commission did not make any change to the rules in response to this comment. The HHW rules only apply to wastes generated by households. The origin and generator of abandoned waste may be unknown, in which case it cannot be assumed to be HHW; therefore, the commission is not expanding the definition of HHW to include small quantities of abandoned Class 1 (industrial) waste or small quantities of hazardous waste.

Timing of Submissions and Reports

Dallas County and Fort Bend commented that the deadline for filing annual reports on the amount of HHW collected should be moved from February 1st to March 1st each year. Grand Prairie commented that annual reports should be due on April 1st rather than February 1st. Harris County commented that the commission had not provided a rationale for the February 1st date in the proposal preamble and that the date should be moved to March 1st. H-GAC commented that the language in §335.413(b)(1) should be changed to ". . . report annually to the executive director no later than 20 days following the end of the fiscal quarter for which the report is applicable . . .."

The commission agrees with the comments in part and is changing at adoption the reporting deadline to April 1st for the previous calendar year. The extended deadline is the latest date requested in the comments and should provide sufficient time for HHW programs to compile data and submit the reports. Although one commenter requested an earlier deadline than proposed, the adopted rule would allow submission any time prior to the deadline to allow HHW programs the greatest flexibility for keeping up with reporting requirements.

Dallas County commented that the shortened deadline for notifications increases flexibility in arranging collections. Dallas County and Fort Bend requested that a provision be added that notifications can be submitted via fax or e-mail. Veolia commented that HHW programs should not be required in §335.403(b) to provide an original and signed notification but that a scanned or electronic copy should also be acceptable. Harris County and H-GAC commented that only an original signed notification can be submitted and that provision means that a notification would have to be mailed. Harris County and H-GAC commented that submitting notifications by fax or electronically should be allowed because this would provide necessary flexibility without having to incur additional costs for using overnight services.

The commission agrees with these comments in part and has made a change to this section indicating that a scanned electronic copy or a facsimile of a signed authorization submitted by facsimile or electronic means satisfies this requirement.

BVSWMA stated that the 90-day deadline for submitting notifications in the previous rules should be retained instead of being shortened to 45 days in order to provide sufficient notice to the commission.

The commission did not make any changes to the rules in response to the comment. Forty-five days provides sufficient notice of HHW collection activities and the decreased advance notice period provides HHW programs flexibility. The 45-day deadline is the minimum amount of advance notice required and provides more flexibility than the previous 90-day deadline for the planning of HHW activities. HHW programs are encouraged to plan collection efforts well in advance, and the commission will accept notifications submitted prior to the 45-day deadline.

BVSWMA suggested that the 45-day operational plans be removed from the rules and any needed changes sent to the commission when necessary. BVSWMA stated that operational plans should be kept on file by the commission.

The commission did not make any changes to the rules in response to the comment. The purpose of operational plans is to facilitate HHW programs in effectively planning and conducting collections and providing adequate staff training. In most cases, the commission does not need to receive copies of the plans, but retains the option of requiring submission as needed. The commission will continue to assist HHW programs upon request with the development of operational plans.

Fort Bend commented that §335.403(b) is vague because it uses terms that are undefined and different interpretations are mixed. Fort Bend suggested moving some of the language in the subsection. Fort Bend commented that TCEQ staff has previously stated that revisions can be made to notifications that have been submitted without restarting the clock and requested that language to formalize this point be added to the subsection. Harris County and H-GAC commented that the phrasing "conducting activities covered by this subchapter" is vague and should be replaced with "collecting, aggregating, and storing household hazardous waste" and also proposed language that would allow amendments to any information in notifications without restarting the 45-day time period.

The commission did not make any changes to the rule in response to these comments. Revisions to submitted notifications are appropriate subject matter for the guidance document for HHW programs. The information listed in the rule must be submitted. Therefore, the type of revision needed for a notification would determine if the deadline for the notification restarts or not. The commission intends for staff to develop forms and guidance to assist HHW programs in getting all required information in the notification timely submitted.

General Content of Submissions and Reports

Harris County, H-GAC, and Fort Bend commented that §335.403(b)(3) should have language added that notifications can include alternate dates for inclement weather.

The commission agrees with this comment and is adding language for this purpose to §335.403(b)(3) at adoption.

Harris County and H-GAC commented that §335.403(b) states that the notification needs to contain specific information and to avoid ambiguity, the subsection also needs to clearly state what information will be in the form that is provided by the commission, as well as that the form needs only to require information that is clearly specified in subsection (b).

The commission respectfully disagrees with these comments and did not make any changes to the rule in response to the comments. The additional wording suggested is not necessary in the rule. The commission does not see a need to specify all information in the rule that is of less consequence to oversight of HHW programs (such as administrative information) that may be on the notification form. If the commission needs to amend the requirements for the submitted notification, it will be done through future rulemaking.

Veolia commented that they support a regulation that identifies with specificity what required records should be provided for HHW collections. Veolia recommended that the records include: 1) a copy of the operational plan; 2) copies of all shipping papers for wastes shipped off-site; 3) a copy of the health and safety plan for the event; 4) a copy of the sign-in sheet for staff being trained on the health and safety plan; and 5) copies of any incident reports for incidents during the HHW event. Veolia commented that this list should be considered sufficient and that the rules should make clear that no other information needs to be submitted.

The commission respectfully disagrees with this comment and did not make any changes to the rules in response to it. Entities conducting HHW collections are required to keep a copy of their operational plan in an appropriate location. Because some permanent collection centers store HHW for up to 180 days, shipping papers are not sufficient records of the wastes stored on site; however, manifests can be used as storage records when appropriate. The health and safety plan is a required part of the operational plan. Records of training must be part of the operational plan, but there are more types of training required than the safety briefing. HHW programs are given flexibility in how they document the various parts of training. There are other records that are required to be submitted to the commission, including the notification and annual report.

Permission from Property Owners to Use Sites

Dallas County commented that the requirement for written authorizations from site owners should be separate from the notification because of potential delays in receiving this written authorization. Dallas County commented that letters from landowners might not be received before the deadline for submitting notifications and should be part of the operational plan rather than the notification.

The commission modified the rules based on this comment. Written authorization from the owner or authorized representative of a property to be used for an HHW collection is a critical part of the planning of an event. Because a denial of use of the property for HHW activities would require an alternate location and a new notification, the written permission from the landowner or authorized representative must be secured during the early stages of event planning prior to notifying the commission.

Harris County commented that the requirement should be deleted for including with notifications written authorizations from site owners to use sites for HHW collections. Harris County commented that they do not see any environmental or regulatory benefit to this requirement, that it is an onerous burden for notification purposes, that the limit of the commission's oversight is from a public health and environment standpoint, and that whether an operator has use of the property for the stated purpose is a contractual issue between and operator and owner.

The commission respectfully disagrees with this comment. However, changes were made to expand the authorization to the property owner or their authorized representative.

Veolia commented that signed permission to use a property can be difficult to obtain and that requiring a signed letter of permission be submitted with a notification is unreasonable and unnecessary. Veolia commented that government entities that own the site to be used for their own collections should not need to provide letters of permission. Veolia commented that the letters of permission should be signed by a person in authority rather than the property owner because the property would be owned by a government. Fort Bend commented that an event-specific standardized release form signed by someone in authority at the collection site should be acceptable in lieu of an authorization letter from the landowner.

The commission agrees with this comment and made changes to the rules in response to the comment.

Required Training

Several comments were received on who should be required to have HAZWOPER training at HHW collections. Fort Worth stated the firefighters working at events may have extensive training but not necessarily HAZWOPER and that HAZWOPER training is not always needed, such as for the unloading of latex paint where on-site training should be sufficient. Fort Worth commented that the provisions in §335.409(b)(10) would require HAZWOPER training for persons at HHW collections who only handle wastes without hazardous characteristics (non-HHW). Dallas County commented that HAZWOPER should not be required for everyone involved with an HHW collection but that training should be appropriate for the specific duties being performed. Dallas County stated that HAZWOPER is specific to emergency response and that the full 40-hour course would only be appropriate for first responders. UTRWD commented that the requirement should be changed in §335.409(b)(10) that personnel who handle HHW or supervise those activities be trained through a HAZWOPER course and annual refresher training. UTRWD gave two suggested alternate requirements: 1) that at least one person at a collection have chemical identification, segregation, and consolidation training and a HAZWOPER or equivalent certificate; or 2) that only trained professionals with HAZWOPER or equivalent certification conduct chemical identification and segregation and that all other personnel have job specific training appropriate to their duties. UTRWD commented that having to provide HAZWOPER training to all staff working on their mobile collection units may be cost-prohibitive for smaller towns. For §335.407(a), Fort Bend commented that the commission should confirm that the training requirements are applicable to those personnel who handle waste and not those taking surveys or other duties that do not involve contact with wastes.

The commission agrees with these comments in part. Because of concerns about costs for training volunteers who unload vehicles delivering household wastes at some events, the commission is changing §335.409(b)(10) at adoption so that the applicability of HAZWOPER training applies at collection events (including those using mobile collection units) and permanent collection centers only after HHW has been unloaded from vehicles delivering it from households; the commission intends that those who segregate and classify HHW after receipt to have HAZWOPER training, including those who perform these tasks on point of generation pick-up vehicles. For those workers who remove containers from vehicles from households, training on the opera-

tional plan is appropriate. The eight-hour awareness level HAZWOPER is appropriate for individuals whose duties entail recognizing when a chemical hazard exists or a spill is occurring. The 24-hour operations level HAZWOPER training is appropriate for individuals who take defensive actions during a spill response or who process HHW received in uncontaminated and non-leaking containers. For those staff who handle contaminated or leaking containers or who clean up spills, the 40-hour technician level training is appropriate. It is important to note that other training is also required depending on job duties, so HAZWOPER is not sufficient by itself for all workers at HHW collections. Individuals involved with collections who unload vehicles delivering wastes from households or who do not handle HHW are not required to have HAZWOPER training, but would require any other training, if any, that is appropriate for their duties.

Several comments were received on allowing alternate training instead of HAZWOPER training. Dallas County commented that HAZWOPER is no longer the best option for HHW collections and suggested that the requirement for training be changed to "HAZWOPER or equivalent training." Fort Worth commented on the proposed training requirements in §335.409(b)(10) and stated that the statement in the rules that persons handling HHW or supervising these activities must have a HAZWOPER certificate is not correct. Fort Worth stated that other training would be much more beneficial. Fort Worth suggested the following language as replacement: "At a minimum at least one person will have chemical identification, segregation, and consolidation training and HAZWOPER or equivalent during an event; all other personnel will have appropriate training pursuant to their duties." San Marcos commented that having a specific requirement for HAZWOPER training may preclude development of training more appropriate and suitable for HHW managers, that HAZWOPER is minimally applicable to HHW operations, and that efforts are underway to develop a course specific to HHW operations. San Marcos commented that the requirement at §335.409(b)(10) for HAZWOPER training may have a dampening effect on development of the HHW course. Harris County and H-GAC suggested alternate rule language requiring a 24-hour course (HAZWOPER or comparable) for persons who handle HHW and awareness-level training (i.e., an eight-hour course) for staff handling non-hazardous materials.

The commission did not make any changes to the rules based on these comments. The commission is not aware of other training that is equivalent and has made no provision for other types of training to substitute for HAZWOPER. If equivalent courses exist or are developed, the commission will consider them on a case-by-case basis and may provide for a broader range of courses through additional rulemaking if appropriate. All persons who handle hazardous waste are required to have HAZWOPER training (including general and site-specific training) under the OSHA HAZWOPER standard (private employers) or the EPA Worker Protection Rule (governmental employers). Although HHW is exempted from being hazardous waste, it presents the same hazards to those who handle it, so HAZWOPER training is appropriate for the individuals who handle HHW after it is unloaded from vehicles delivering the wastes from households. Although firefighters are often trained in emergency response to spills of hazardous chemicals, they generally are not trained on how to handle hazardous waste or HHW during normal collection operations. The federal OSHA and EPA requirements for HAZWOPER training include site-specific training in addition to the general training; therefore the HAZWOPER training must be specific to the individual HHW operation. The commission notes that any course for HHW operations could be developed consistent with HAZWOPER requirements. It is important to note that current OSHA and EPA regulations do not specify who can provide the training, so that this training can be provided by anyone with expertise in the issues. Therefore, the requirements for HAZWOPER training are appropriate to staff and volunteers at HHW collections whose job duties are related to handling HHW after unloading and to recognizing chemical hazards, and providing the appropriate level of HAZWOPER training should not be overly burdensome for any HHW program. HAZWOPER training can and should be tailored to HHW programs and their specific operations. This allows the flexibility for HHW programs to develop appropriate and suitable HAZWOPER training.

Fort Bend commented that advice is needed on the training required by the state and federal laws and regulations listed in §335.407 because they do not have copies of the sections cited. Houston commented that guidance be provided on specific training requirements based on job functions at HHW collections.

The commission agrees with these comments. The commission intends to develop a guidance document to address training issues.

Harris County and H-GAC commented that §335.407(d) requires that individuals who handle HHW are trained as if the waste were hazardous waste, but that HHW is exempt from being hazardous waste. Harris County and H-GAC commented that while HHW programs are voluntarily providing excellent training to those participating in events, the proposed provision adds an onerous requirement that goes beyond legal requirements. Harris County and H-GAC commented that the proposal preamble did not provide a justification for the requirement but only gives the example of using a HAZWOPER course, which is expensive and resource intensive as a 40-hour course. Fort Bend commented that §335.407(d) states training must be done "as if the waste were hazardous waste" although HHW is exempt from being hazardous waste and asked why they need to pay for training from which they are exempt.

The commission agrees with these comments in part. The language in §335.407(d) was added to the proposal specifically because HHW presents the same hazards as hazardous waste to those who handle it although HHW is exempted from the requirements of hazardous waste. Because of the concerns expressed by the regulated community, the commission is changing the training requirements at adoption so that HAZWOPER training only applies to personnel who handle HHW after unloading from vehicles delivering wastes from households. The training that is required for hazardous waste workers is the same as what is needed for persons processing, storing, and transporting HHW, but would not apply to HHW operations without this provision in these rules. The provision does not require training above that needed for hazardous waste workers, and the option for providing the training in-house applies to HHW operations. Therefore, the HAZWOPER training can be provided at the site rather than in a classroom and can be presented by any person with sufficient knowledge of the issues (i.e., expensive classroom courses are not required). Additionally, there are multiple levels of HAZWOPER training, with only the highest level requiring 40 hours of training; HHW programs must train those handling HHW after unloading from vehicles delivering wastes from households to the level of HAZWOPER that is appropriate for their individual duties.

Harris County and H-GAC commented that HAZWOPER training required by 29 CFR §1910.120 was not intended for HHW

operations. Harris County and H-GAC applauded the commission for recognizing the need for training in the HHW industry, but commented that HAZWOPER training is in no way reflective of the job duties performed at an HHW collection. Harris County and H-GAC noted that staff who take HAZWOPER courses still require HHW-specific training. Harris County and H-GAC proposed that the HAZWOPER training be given in-house and not require an outside training provider. Harris County and H-GAC stated that the commission's guidance document should reflect the topics required for a comparable course.

The commission agrees with these comments in part. In response to comments, the commission is restricting to applicability of HAZWOPER training only to personnel at collection events who handle HHW after it is unloaded from vehicles delivering wastes from households. The part of the standard that is applicable to most HHW programs is the regulation pertaining to operation of hazardous waste processing, storage, or disposal facilities (i.e., 29 CFR §1910.120(p)). In cases where HHW program staff are required to perform emergency responses to spills, the emergency response provisions in 29 CFR §1910.120(r) also apply. The commission respectfully disagrees that the provisions of 29 CFR §1910.120(p) are not directly pertinent to operations involving aggregated HHW. Because HHW would be classified as hazardous waste if it were not for the exemption for waste generated by households, the training requirements for hazardous waste are appropriate and comparable. The commission agrees that the training can be provided by any person with sufficient knowledge in the subject area, so that in-house training is adequate as long as the trainer is sufficiently knowledgeable. It is important to note that the HAZWOPER standard specifies that site-specific training must be provided, and the commission intends that this be done for HHW programs as well. The commission respectfully disagrees that 24-hour training is all that is needed for HHW workers who handle HHW - the level of training depends on the exact job duties of the individual (i.e., 24-hour training is appropriate for HHW workers who directly handle the containers of aggregated HHW but who do not respond to significant spills; eight-hour training is appropriate for HHW workers who need to recognize potential chemical hazards, like leaks from containers of aggregated HHW, but who would not respond to the hazards; 40-hour training is needed for those who would cleanup significant spills; and no HAZWOPER training is needed for HHW workers who do things like direct traffic or handle HHW prior to aggregation). Because there is so much variation in how HHW programs divide these duties, the general references are more appropriate in these rules than specific requirements. Training issues will be covered in detail in the guidance document contemplated for HHW programs.

Veolia commented that they support specifying the minimum levels of training to work in HHW programs but that certificates of training should not be required because not all training courses provide certificates and because certificates may not list all topics covered. Veolia specified initial HAZWOPER courses and forklift training from OSHA as not requiring certificates. Veolia stated that some types of training need to occur on the job rather than in training courses. Veolia recommended that the rules allow documenting training through any type of documentation. UTRWD commented that the requirement should be changed that topics covered in training must be documented on a certificate.

The commission agrees with these comments in part. In response to these and other public comments, the commission is changing at adoption the word "certificates" in §335.405(a)(9)(B) to "records" to allow records other than certificates to be used to document training. The proposed rules did not specify what constitutes a certificate for training, and the term was intended to mean documentation that training was completed. In most cases, training certificates are provided by training providers for specific courses, but the commission agrees that certificates can include other records of training. The commission agrees that much of the HAZWOPER and other training must occur in and be specific to the collection program, such that a certificate from a classroom HAZWOPER course is not sufficient to document all required training for workers who may handle HHW after it is unloaded from vehicles delivering waste from households. Therefore, all required training must be documented through a record.

Veolia and Fort Bend commented that the citation for the HAZWOPER regulations is incorrect in §335.409(b)(10).

The commission agrees with this comment, and the citation is removed at adoption in the revised rule.

Harris County commented that the fiscal note sections of the proposal preamble were incorrect in stating that the rule revisions would not cause a fiscal impact because of the requirements for providing HAZWOPER training to workers who handle HHW, which equates to $400 to $800 per person.

The commission did not make any changes to the rules in response to this comment. The requirement for this type of training was in the previous rule, where §335.407(c)(3) stated "Personnel involved with handling waste must be instructed in accident prevention, the proper response to fires, explosions, and spills, and in the use of protective devices (such as respiratory gear and gloves) to minimize exposure to {HHW}." These provisions are part of the content of most HAZWOPER training. The commission acknowledges that there is a cost for HAZWOPER courses provided by training organizations, but there is no requirement that the training be done in this manner. The OSHA HAZWOPER Standard (as well as the EPA Worker Protection Rules) does not require certified instructors or other requirements that would preclude providing this training "in-house" within an HHW program as long as there is a person with sufficient knowledge to provide the training. The specific language from the federal standard, 29 CFR §1910.120(p)(7)(iii), for the training of persons who handle hazardous waste in processing, storage, or disposal facility reads: "Trainers who teach initial training shall have satisfactorily completed a training course for teaching the subjects they are expected to teach or they shall have the academic credentials and instruction experience necessary to demonstrate a good command of the subject matter of the courses and competent instructional skills." Therefore, there are costs for the training if a HHW program chooses to use an outside training provider, but in-house training is also allowed. It is also important to note that training on the specific job site and duties is also required by the OSHA HAZWOPER Standard, such that a classroom HAZWOPER course by itself is not sufficient training for workers who handle HHW after it is unloaded from vehicles delivering wastes from households (i.e., site-specific training must also be provided).

Harris County and H-GAC commented that the commission is exceeding its statutory authority in specifying training requirements that are not necessary or beyond the requirements contemplated by Texas Health and Safety Code, §361.029(b) and that the fiscal implications of additional training are not taken into account at all. Harris County and H-GAC commented that several of the regulations listed in §335.407(c) are not within the commission's jurisdiction and that the commission's staff is

not trained to regulate or enforce violations of these regulations. Harris County and H-GAC commented that the Texas Hazard Communication Act even excludes hazardous waste from coverage and should be deleted.

The commission has not made any changes to the rule in response to these comments. Texas Health and Safety Code, §361.029 requires the commission to establish the necessary training for persons involved in the collection and disposal of HHW. The statute does not specify any particular or minimum training requirements. The training requirements at §335.407(c)(3) in the previous rules are similar to the OSHA regulations referenced in new §335.407(c). The commission replaced the former requirements with the reference to OSHA regulations because the OSHA requirements state more clearly what is needed for training for HHW collections. Although the commission will not be enforcing OSHA regulations, reference to the industry standards for training provide HHW programs a source for additional requirements pertaining to their operations. The Texas Hazard Communication Act is applicable to reuse programs where HHW staff handles chemical products rather than wastes. If reuse materials are handled or used within the HHW program, chemical right-to-know training is needed for the persons involved. In §335.407(c)(1) and (4), the previous rules required that training equivalent to the DOT training for preparing and packaging wastes for transportation be provided. For clarity, the revised rules reference the federal standard, but the required training is still the same. The reference to the EPA training requirements at 40 CFR §265.16 is also made for clarity and pertains to the training requirements at §335.407(c)(2) in the previous rules. The commission does intend to develop guidance to assist HHW programs meet and address applicable training requirements.

Manifesting, Packaging, and Transportation of Wastes

Harris County, Fort Bend, and H-GAC commented that it would be time consuming and costly to train existing personnel or to hire chemists trained on the requirements of the Resource Conservation and Recovery Act (RCRA) to be on-site to apply RCRA waste codes to manifests, that aggregated HHW is packed DOT compliant and compatibility compliant, and that there is no safety benefit if waste codes were applied. Harris County and H-GAC commented that HHW is federally exempted from waste codes and to enforce waste codes would be a burden to taxpayers and a deterrent for some government entities to start an HHW collection program.

The commission agrees with the comment. Although the federal exemption for household wastes excludes HHW from being hazardous waste, the commission has required, since the time that the HHW rules were first promulgated, that aggregated HHW be manifested. The commission considers that this requirement similar to the state-only manifesting for Class 1 Industrial Waste and that its use is protective of human health and the environment. Manifests are used to communicate the hazards associated with the wastes to the receiving hazardous waste processing, storage, and disposal facilities and to track waste from cradle to grave. The commission allows HHW programs flexibility on the specific coding as long as all the relevant information on the hazards associated with the specific HHW being shipped is communicated to the receiving facility on the manifest. The safety benefit of this requirement is that the receiving facilities receive information regarding the hazards associated with the wastes and the disposal restrictions that apply to specific materials so that wastes are disposed of safely and properly.

Harris County, Fort Bend, and H-GAC commented that HHW should not be subject to RCRA waste codes. Harris County, Fort Bend, and H-GAC commented that the reason behind the waste codes for hazardous waste was to ensure that correct treatment technologies are performed by processing, storage, and disposal facilities. Harris County, Fort Bend, and H-GAC commented that requiring the use of waste codes could prevent entities from conducting HHW collections.

The commission did not make any changes to the rules in response to these comments. Disposing of HHW as if it is hazardous waste accomplishes the two-fold goal of HHW collection programs, to divert HHW from the municipal solid waste stream and to properly dispose of the waste. HHW programs aggregating HHW must provide the needed information on the manifest (either by their own staff or through contractors). However, the commission will allow flexibility to HHW programs on how this information is provided on the manifest. Various options that may be used to complete the manifest will be considered for inclusion in a guidance document.

Receipt by Permitted Facilities

PSC stated that the proposed wording "with a permit authorizing the receipt of household hazardous waste" in §335.417 creates a problem. PSC stated that neither of their permits for hazardous waste processing, storage, or disposal facilities, nor any other permits to the best of their knowledge authorize the receipt of HHW. PSC requested that the phrases be removed from the rules or that permit modifications to add HHW to permits be in the form of Class 1 permit modifications. Dallas County commented that no distinction between HHW and hazardous waste is made in some permits for facilities outside Texas, so that the phrase "authorized to receive household hazardous waste" should be changed to allow any permitted disposal facility to receive the HHW. Veolia commented that the wording implies that the permit would need to explicitly state that the hazardous waste processing, storage, or disposal facility can receive HHW but that no permits do so. Harris County and H-GAC commented that hazardous waste permits usually do not specify whether the facility can accept HHW and suggested changing related language throughout the rules. Fort Bend commented that this language should be changed throughout the rules for similar reasons.

The commission agrees with these comments, and the phrase "authorized to receive household hazardous waste" is being removed from §335.417. Although permitted processing, storage, or disposal facilities are authorized to receive HHW, this is not specifically stated in most permits. Because this issue appears to be confusing to the regulated community, the language is being deleted at adoption.

Storage Time at Collection Events

Veolia commented that the definition of "collection event" should be changed such that the 24-hour period for storing HHW on site should be extended to 72 hours. Veolia commented that some HHW collection events last for more than one day and that large one-day events may take longer than 24 hours to package the HHW received. Veolia stated that for some one-day events, transporters are not able to coordinate the pickup of materials on the same day as the collection. Veolia requested clarification on when the storage period would start. Harris County and H-GAC commented that the 24-hour period should be increased to 48 hours because in some cases larger than anticipated participation in HHW collections can cause the wastes to be picked

up until the next day. Fort Bend commented that the definition should be changed to specify a 48-hour period.

The commission agrees with these comments in part and is changing at adoption the definitions of "collection event" and "permanent collection center" to use a 48-hour period (rather than the proposed 24-hour period) to distinguish between these types of operations. Although the commission expects that it will be extremely rare for a collection event to be so large as to require more than 24 hours to hold the event and prepare the wastes for transport, there may be some cases where a longer period would be needed. The commission is allowing 48 hours rather than 72 hours because it is not expected that a collection event would need more than 48 hours to complete its operation if it is properly planned and operated. The commission notes that security of the site is required during the full time that the collection event is underway, such that wastes cannot be left unattended or unsecured during the entire period.

San Marcos commented that it is not clear in the definition of "collection event" in §335.402(2) when the 24-hour storage period begins. San Marcos suggested that the rule be changed to specify that the 24-hour period begins at the end of the collection event.

The commission did not make any changes to the rules in response to this comment. Throughout Chapter 335, the term "storage," as defined in §335.1(137), means "the holding of solid waste for a temporary period, at the end of which the waste is processed, disposed of, recycled, or stored elsewhere." As previously noted, the period is being changed to 48 hours. Under this definition, storage at a collection event starts when a shipping container of waste first begins to be filled, such that the 48-hour period ends 48 hours after the first waste is placed in a shipping container at the collection.

Satellite Collection Centers

UTRWD commented that the proposed rules did not include a definition for satellite collection centers. UTRWD suggested a definition that would allow shipping HHW from a satellite collection center to a permanent collection center. UTRWD suggested a change to §335.403(b)(5) to allow transferring HHW from satellite collection centers to collection events or permanent collection centers.

The commission agrees with these comments in part. As discussed previously in the preamble, satellite collection centers have the same requirements as any permanent collection center and do not need a separate definition. The commission is changing the rules at adoption to allow consolidation of HHW. Under the revised rules, HHW can be transferred between programs in any manner for consolidation.

Fort Worth commented that they want to have HHW collections at municipal solid waste drop-off stations and that to allow this action, a specific definition for a satellite collection facilities should be added to the rules. Fort Worth suggested that these sites be limited to storing for no more than ten days. Fort Worth indicated that they want to be able to haul collected wastes from the satellite collection centers to their permanent collection center using mobile collection units because it would be more cost-effective to consolidate the wastes for transportation at one facility.

The commission respectfully disagrees with this comment and did not make any changes to the rules based on the comment. The rules do not create a definition of a satellite collection center. If not staffed, facilities for drop off and collection of HHW potentially pose too great a risk that the waste will not be properly managed, handled, and secured. As discussed previously in the preamble, manned satellite collection centers would be the same as any other permanent collection center. The length of storage at HHW facilities is based on the volume of wastes stored. Because smaller facilities are less likely to exceed the 3,000 kilogram threshold, it is not appropriate to apply the shorter period unless that threshold is exceeded.

Dallas County commented that HHW programs need the flexibility to use mobile collection units to transfer HHW between permanent facilities. Dallas County indicated that this issue is particularly important for programs that set up satellite collection centers because it is cost-prohibitive to ship HHW from several small facilities instead of one central location. Dallas County noted that a major factor in the cost is the requirement to ship partially filled containers of HHW at the same cost as a full container. Dallas County suggested that load limits might be an appropriate mechanism to govern this activity. Fort Worth commented that the requirement to ship HHW from permanent collection centers to hazardous waste processing, storage, or disposal facilities will greatly increase costs for programs operating satellite collection centers. Fort Worth strongly requested that the commission allow wastes from satellite collection centers to be shipped to other permanent collection centers for consolidation with other HHW to reduce disposal costs. Harris County, H-GAC, and Fort Bend commented that a new §335.403(d)(4)(D) should be added to allow HHW programs to transport any aggregated HHW to another permanent collection center in order to minimize costs. Dallas County suggested a similar change for §335.403(d)(4)(A).

The commission agrees with these comments in part. The commission is changing the rules at adoption to allow consolidation of HHW. Under the revised rules, HHW can be transferred between programs in any manner for consolidation.

Mobile Collection Units

San Marcos commented that the definition of "mobile collection unit" in §335.402(8) appears to prohibit the units from transporting wastes for aggregation, which would require that a hazardous waste transporter haul the wastes collected by the mobile collection unit. This fact negates the cost saving gained by using mobile collection units.

The commission did not make any changes to the rule in response to this comment. The definition of "mobile collection unit" in §335.402(8) reads "A vehicle (such as a truck or trailer) that is used to aggregate household waste materials delivered by the public prior to transporting the material to a permanent collection center, collection event, or registered hazardous waste transporter facility." The definition clearly allows mobile collection units to transport the wastes that they collect to a permanent collection center or collection event for aggregation with other HHW or to a hazardous waste transporter to haul the HHW for processing or disposal. The rules allow mobile collection units to deliver HHW to an appropriate facility.

Dallas County stated that the rules for mobile collection units should be clarified to specify that a mobile collection unit is a vehicle or group of vehicles to serve a collection site. Dallas County stated that their mobile collection units are a truck and trailer combination.

The definition of "mobile collection unit" provides examples of what would generally constitute a mobile collection unit with the phrase "(such as a truck or trailer)", but this does not prohibit

truck and trailer combinations from being a single mobile collection unit. The commission agrees that a truck pulling a trailer used for the collection of HHW is a single mobile collection unit unless the truck (separately from the trailer) is used for a second collection of HHW when the trailer is used for the first collection.

Harris County commented that, because they transfer wastes collected with their mobile collection units to the City of Houston's permanent collection center and because timing of the collection events does not coincide well with the operating hours of the receiving collection center, the requirement to deliver wastes on a mobile collection unit within 24 hours of receipt is overly burdensome. H-GAC commented that mobile collection unit events may be conducted by one operator and the waste may be taken to another operator's permanent facility for aggregation, and suggested changing the 24-hour period for delivery to 72 hours. Harris County noted that the mobile collection unit is kept at a locked facility between the collection and delivery. Harris County commented that having to deliver the aggregated HHW within 24 hours would require both Harris County and the City of Houston paying staff for this work on weekends. Harris County commented that it would also be costly to have their disposal contractor pick up the wastes within 24 hours of the collection. Harris County commented that because hazardous waste transporters are allowed ten-day storage under §335.94(a), increasing the period to 72 hours is not unreasonable. Fort Bend commented that the period of delivery of aggregated HHW should be 72 hours based on the manner in which Harris County operates their mobile collection unit. Dallas County commented that the 24-hour period in which to deliver HHW collected with a mobile collection unit is too short. Dallas County stated that for large collection events, it can take substantial time to prepare the wastes for shipment and that a permanent collection center may not be open by the time delivery is made. Dallas County stated that the limited time may require the paying of overtime to staff who are preparing for wastes for shipment and for the staff of the receiving facility. Dallas County recommended a 72-hour deadline be substituted. Grand Prairie commented that mobile collectors with adequate facilities for securing and storing HHW should be allowed to store collected HHW for up to five days without being considered a permanent collection center. Grand Prairie indicated that the need for storing HHW in a mobile collection unit might be caused by weather or road conditions or the operating hours of the receiving permanent collection center. Grand Prairie stated that the days of their collection events do not always allow delivery of HHW to the Fort Worth permanent collection center within 24 hours.

The commission agrees with these comments. At adoption the period for delivery of collected HHW by mobile collection units and point of generation pickup vehicles is being increased from 24 hours to 72 hours.

UTRWD commented that the definition of "collection event" in §335.402(2) should be changed to allow 72 hours for transportation of collected HHW off the site and that changing from the current ten-day period to a 24-hour period for delivering collected HHW to a permanent collection center would be overly burdensome.

The commission agrees with these comments in part. At adoption the period for delivery of collected HHW by mobile collection units and point of generation pickup vehicles is being increased from 24 hours to 72 hours. However, the ten-day period in the previous rules for storage of waste applied to permanent collection centers with more than 3,000 kilograms of HHW, not to mobile collection units. It is not appropriate to use mobile collection units for storage of HHW beyond 72 hours because these units do not provide the security of a permanent collection center.

Grand Prairie commented that mobile collection programs that contract with a permanent collection center should not be required to evaluate processing and disposal options, which are made by the permanent collection center.

The commission did not make any changes to the rules based on this comment. The responsibility for proper disposal of aggregated HHW rests with the program conducting the collection. In cases where a contractual arrangement exists between the entity conducting the collection and another entity, the responsibility to ensure compliance with the HHW requirements, proper disposal, and the choice of the disposal facility used remains with the entity submitting the notification to the agency and conducting the collection. Therefore, collection programs must evaluate processing and disposal options in order to fulfill these obligations.

Required Safety Equipment

Grand Prairie commented that the requirement is excessive that mobile collection units have enough absorbent and containment to contain a spill of 10% of the liquid wastes collected. Grand Prairie stated that mobile collectors should be required to only provide a spill kit and one 40-pound bag of absorbent per vehicle. San Marcos commented that requiring 10% spill control would increase costs by greatly increasing the amount of spill control materials that programs must keep on hand. San Marcos commented that the requirement for containment and absorbent should be changed for all types of HHW collections to enough for a spill or 10% of all liquid wastes or the largest container of liquid waste present. Harris County and H-GAC commented that in §335.411(b)(3), because some HHW collections using mobile collection units have more than one unit present, the rule should be changed to only require one set of the emergency response items listed in the paragraph. Harris County and H-GAC commented that spill materials such as oil dry and vermiculite are expensive and that for large spills a qualified company would be called to respond. Harris County and H-GAC commented that the drums used to hold wastes qualify as containment. Harris County, Fort Bend, and H-GAC commented that it would be costly for government entities to spend money for spill materials they may not need.

The commission agrees with these comments. At adoption, the rules are changed to require only one set of emergency equipment at a collection regardless of the number of mobile collection units involved. At adoption, the rules are changed to require only enough absorbent and containment to respond to a spill of 10% of liquid wastes from the largest mobile collection unit.

Dallas County stated that their mobile collection units are a truck and trailer combination and that only one set of required equipment, other than fire extinguishers, should be required at a collection event using mobile collection units. Dallas County further stated that fire extinguishers should be in each vehicle and trailer used for HHW.

The commission agrees with this comment. At adoption the rules are changed to require only one set of safety equipment for a single collection.

Harris County, Fort Bend, and H-GAC commented that the requirement in §335.409(c)(5) for sufficient adsorbent and contain-

ment to control a spill of 10% of all liquid wastes anticipated to be collected be changed to enough containment and absorbent to handle 10% of all uncontained liquid wastes at a collection center or event. Harris County, Fort Bend, and H-GAC commented that the requirement in §335.411(b)(3)(E) for enough absorbent and containment to control a spill of 10% of all liquid wastes on a mobile collection unit should be changed to enough to control a spill of 10% of all uncontained liquid wastes at an event.

The commission respectfully disagrees with these comments and has not made any changes to the rules in response to the comments. All liquid wastes received at HHW collections are in containers, such that the addition of the word "uncontained" to the rule would negate the requirement to have materials present to respond to liquid spills. The purpose of the materials is to respond to spills in the event that a container fails. The commission agrees that, in some cases, a drum holding HHW can count toward the amount of materials required, but not in all cases. In cases where containers of liquid wastes received from households are lab-packed into drums with an absorbent to pad the inner containers and absorb any spills, the wastes in the drum would not need to be considered as part of the total liquid wastes because the drum and absorbent would be enough to contain all the liquids in the drum should any or all of the primary containers break inside the drum or even if the outer drum also fails. However, in cases where liquid wastes are received in containers that are not lab-packed but are either poured into bulk drums (i.e., bulked) or are shipped as received, the container cannot count toward the spill control materials because it would release the contents if it fails; the content of these containers must be counted as part of the total liquid wastes. The drum and absorbent for lab-packed wastes that are already filled cannot be counted toward the spill response materials for other liquid wastes because that drum and absorbent are no longer readily available to respond to a spill. The required amount of spill control materials is set at a level sufficient to control a spill of 10% of liquid wastes present rather that the total amount of liquid wastes because the commission is ensuring that there is sufficient material present to take initial defensive actions against spills (i.e., preventing flow into storm drains, bodies of waters, etc., and stopping uncontrolled spread of the wastes) immediately during emergency spill responses. These requirements are included as a precautionary step to reduce the risk of harm to human health and the environment in the event of an accident.

HHW Versus Hazardous Waste

PSC commented that the proposed new language in §335.415 that HHW be treated "as if it was hazardous waste" would contravene the DOT requirements at 49 CFR Parts 171-180. PSC stated that HHW should not be identified as hazardous waste on a manifest through the use of waste codes, but rather as "HHW Exempt." Dallas County commented that they are concerned about the language requiring HHW to be handled "as if it was hazardous waste" and that the federal exemption for household waste allows HHW programs to keep down costs and exercise options that would not be financially feasible if they were required to use hazardous waste vendors for all collection, aggregation, and transportation services. Dallas County commented that the federal exclusion for household wastes was passed on to HHW programs and licensed transporters to allow them to handle HHW as an exempt waste. Dallas County commented that the language that HHW be handled as if it was hazardous waste might be interpreted as meaning that the federal exclusion for household wastes is being eliminated. Harris County commented that the provisions that include "as if it was hazardous waste" mean that the rules exceed a federal standard and exceed an express requirement of state law, which is contrary to the statements made in the Draft Regulatory Impact Analysis in the proposal preamble. Harris County commented that the phrase "as if it was hazardous waste" should be stricken from the rules.

The commission does not regulate HHW as hazardous waste; HHW is specifically excluded from hazardous waste. Although HHW is exempted from regulation as hazardous waste, HHW may present the same properties, characteristics, and safety concerns as hazardous waste. Under Texas Health and Safety Code, §361.029, the commission is required to adopt rules for the collection and disposal of HHW, and the commission intends that the collection and disposal of HHW be done in a manner that is safe and protective of the environment. The addition of the phrases "as if it was hazardous waste" to 30 TAC §335.415(a)(3) - (5) pertains to the applicability of the other cited sections rather than eliminating the federal exemption for household waste or certain entries to be used on manifests. Because §§335.4, 335.11, and 335.14 apply to hazardous waste and HHW is not classified as hazardous waste, the previous rule language was subject to an interpretation that the general prohibitions in these rule sections are not applicable to HHW, that properly completed manifests were not needed for shipping HHW, and that the recordkeeping requirements for transporters did not apply to HHW. The new phrase, "as if it was hazardous waste," was added to clarify that these sections are applicable to HHW that is aggregated in collection programs. The specific entries to be used in manifests are not covered in the cited sections and are not impacted by the phrasing, as long as the manifest meet their intended purpose of informing the ultimate disposal facility of the hazards associated with the specific wastes. Additionally, the phrase "as if it was hazardous waste" does not mean that the commission is changing the definition of HHW or classifying HHW as hazardous waste. Inclusion of the phrase "as if it was hazardous waste" in no way requires that hazardous waste vendors be utilized for collection and aggregation activities.

Regulatory Guidance

San Marcos commented that a guidance document should be created to aid in the interpretation and practical application of the rules to HHW programs and activities. Harris County commented that guidance on the rules is needed, suggested that several parts of the rules should be guidance rather than rules, and suggested provisions to require guidance in the rules, including public comment and meetings on the draft guidance and any future changes. H-GAC and Fort Bend commented that the rules should clearly state that the commission will develop a guidance document with input from stakeholders and that the rules should require the commission to receive comments from stakeholders and update the guidance document annually. Fort Bend applauded the efforts by the commission to provide a guidance document on the rules and commented that the commission's interpretation of how detailed operational plans should be has varied not only within their operational plans but among the different HHW programs. Fort Bend commented that the intent of the words "nature, type, and quantity" in §335.405(a)(1) should be to advise the types and amounts of waste that HHW programs anticipate receiving and that the guidance document should define what information the commission is requesting.

The commission agrees that guidance documents are beneficial and intends to develop guidance on HHW activities, but a rule

requiring the issuance of guidance is not necessary. The commission welcomes input from all interested parties on the usability of its guidance documents and other outreach materials, and the commission is retaining its flexibility for the procedure for producing the guidance. The commission will also work with the Pollution Prevention Advisory Committee and the members of the quarterly HHW Managers meeting on the development of the guidance document to ensure that views outside the commission are considered in its development. The commission will consider the specific issues to be included in the guidance.

Fort Bend commented that in §335.405(a)(2) the intent of the words "sources" and "amounts" should be the entities from which an operator will accept wastes and the types of wastes that will be accepted. Fort Bend commented that these terms should be defined in the guidance documented as to what information the commission is requesting.

The commission did not make any change to the rule based on this comment. The cited paragraph reads: "The operational plan must describe the source(s), amounts and types of wastes that would be accepted . . . , and if the collectors involved in the programs are not under a single operator, must describe the source(s), amounts, and types of wastes that will be transferred by a point of generation pick-up service or mobile collection unit to a collection event or permanent collection center." The meaning of "source(s)" is "from where the wastes are coming." In the first instance, this information could be provided by listing specific entities, but more likely would be done by specifying that the wastes will come from households in a specific geographic area (such as a specific municipality of county. In the second instance, this information would likely be done by specifying point of generation or mobile collection unit collections within a certain geographic area because programs may select the receiving facility based on proximity to the location of the collection. The meaning of "amounts" in both instances is separate from the types of wastes and refers to the quantity of each type of waste anticipated to be received or transferred. The commission will consider this issue in the guidance.

Other Issues

Fort Worth commented that the cost of running events must be kept as low as possible for communities to participate.

The commission agrees that the costs of HHW programs should be kept as low as possible, as long as adequate protection for workers and the community are provided in the operation of the programs. Where possible, flexibility has been incorporated into the rules to allow programs options in how they operate, with provisions that all programs meet minimum safety and training requirements.

Veolia commented that the word "person" in §335.402(9) should be changed to "entity" because a company, governmental entity, or non-profit group, rather than an individual, are generally responsible for HHW collections.

The commission did not make any change to the rule in response to this comment. Commission rule in 30 TAC §3.2(25) "person" is defined as "an individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, trust, or any other legal entity." Because the definitions in §3.2 apply to all the commission's rules, the meaning of "person" in these rules covers all legal entities.

Harris County, H-GAC, and Fort Bend commented that a typographic error in §335.402(9) needs to be corrected by changing "if" to "of" in the last sentence.

The commission did not make any changes to the rule in response to these comments. The commission reviewed the proposed language for the definition of "operator," which is a single sentence. The use of "if" in the definition is correct and intended. The commission did find a typographic error in §335.403(c) and is adding the word "center" after the phrase "permanent collection" in this subsection, as discussed previously.

Houston and Harris County commented that some HHW programs are not voluntary but are mandatory by way of permit provisions included in municipal separate storm sewer system (MS4) permits, National Pollutant Discharge Elimination System permits, and Texas Pollutant Discharge Elimination System permits. Harris County commented that the fiscal note of the proposal preamble incorrectly states that HHW programs are voluntary.

The commission respectfully disagrees with these comments and did not make any change to the rules in response to the comments. The commission does encourage the collection of HHW, but no one is required to engage in these activities under these rules. While permit provisions requiring implementation of programs "to collect household hazardous waste materials for recycle, reuse, or proper disposal" are included in individual MS4 permits, MS4 permits do not require HHW programs. An HHW collection program is a voluntary election made by the permitee to comply with MS4 requirements in federal rules at 40 CFR §122.26(d)(2)(iv)(B)(6), requiring education, public information, and other appropriate activities to facilitate proper management and disposal of used oil and toxic materials to prevent illicit discharges of materials in a storm sewer. This election is but one possible best management practice that may be included in storm water management programs. Permitees may revise their existing storm water management programs.

Harris County, H-GAC, and Fort Bend commented that the fiscal note in the proposal preamble incorrectly indicated that there would be a three-year record retention schedule for records pertaining to HHW programs.

The commission agrees with this comment. Because that part of the proposal preamble is not included in the adoption preamble, the commission is noting here that the intent is for a one-year record retention schedule under these rules.

Harris County and H-GAC commented that the proposal preamble incorrectly stated that the requirement was being retained for an attachment in the operational plan covering evidence of competency including experience and qualifications of key personnel with new provisions requiring copies of training certificates. Harris County and H-GAC commented that the proposed rule language actually greatly expands the previous requirements by requiring copies of certificates for contractor staff and other staff and individuals. Harris County and H-GAC commented that having to print copies of certificates for numerous persons would be costly and set a bad environmental practice. Harris County and H-GAC commented that different levels of training are needed and not all training would result in certificates. Fort Bend, Harris County and H-GAC commented that the term "key personnel" should not be defined but left to the discretion of operators. Fort Bend commented that Attachment B of the operational plan should have the training certificates of the key personnel, but not of all individuals at an event who are required to be trained

because more than 100 persons may work at large collection events and requiring hard copies would set a bad environmental practice. Fort Bend commented that all training records are kept on file by employers and that copies may be obtained as necessary by the commission.

The commission agrees with these comments in part, but respectfully disagrees with other parts. In §335.405(a)(9)(B), the word "certificates" is being changed to "records" at adoption to allow for training that does not include the provision of a certificate. "Key personnel" applies to all individuals in a HHW program who have duties that require specific training under the rules (other than the safety briefing at the beginning of collections). Records must reflect the required training of all those participating in the operation. One purpose of keeping a current operational plan on-site is to provide a complete copy of the training records for quick reference by the HHW program in order to facilitate keeping the training up to date. Language in the previous rules requiring bound or stapled hard copies of operational plans was intentionally deleted, so that there is no requirement that the plans be in any specific media or format or that the entire operational plan be in a single unit. The rules allow the plans to be maintained in any combination of media. Training records may be maintained in separate files and still considered part of the operational plan as long as they are stored at the required location(s) for operational plans.

Harris County and H-GAC commented that the term "specific personnel" in §335.405(a)(9)(C)(iii)(VII) be changed to "health and safety key personnel" because reference to "specific" is vague.

The commission did not make any change to the rule based on this comment. Section 335.405(a)(9)(C)(iii) covers the detailed procedures in an operational plan for avoiding and responding to spills, and §335.405(a)(9)(C)(iii)(VII) requires that the procedures specify the duties of specific personnel in avoiding and responding to spills. This information is needed in the operational plan for all those involved because the HHW program must determine what specific training and equipment are needed (including proper fit for personal protective equipment), so knowing in advance who will be involved in specific actions is very important in planning collections.

Fort Bend commented that in §335.405(a)(9)(C)(iii)(VII) that the phrase "the duties of specific personnel" be changed to "the duties of specific job functions."

The commission agrees with this comment in part. Instead of replacing "personnel" with "job functions," the commission is adding at adoption "or job functions" after "personnel." The original phrasing provides the most flexibility for HHW programs, but understandably, programs might be concerned if personnel substitutions had to be made during events such that the operational plan would not reflect the actual operation. Because the context of this requirement is the Health and Safety Plan attachment of the operational plan, which is used to plan spill responses wherein specific personal protective equipment (PPE) that fits a specific person must be planned for and available, and specific training is required to perform some job functions, linking this provision to job functions would limit the flexibility of who could be assigned to some job functions. The original wording allows individuals who have the proper training and PPE to perform spill response duties regardless of what job they are filling for the collection itself, and allows programs to specify a group of individuals as being responsible for specific spill control and response functions. By adding "or job functions" to the provisions, the rule allows HHW programs the flexibility to select either approach. When selecting the latter approach, HHW programs must consider the training of personnel and the availability of proper PPE at the collection in assigning staff to job functions.

Harris County and H-GAC commented that in §335.409(b)(6) the proposed rules specify duties to an on-site supervisor that in actual practice may be performed by different people. Harris County and H-GAC suggested that the phrase "a person of authority" would be better in this regard. Harris County and H-GAC commented that §335.409(b)(7) assigns a different task to the on-site supervisor that is often actually performed by police officers and constables. Fort Bend commented that "a person of authority" should be used in addition to or in replacement of "on-site supervisor" in §335.409(b)(6) and (7).

The commission agrees with these comments in part, but has not made any change to the rule in response to the comments. Because the term "on-site supervisor" is not defined, each HHW program must determine who will fulfill this role at a collection event or permanent collection center. The rules do not preclude the on-site supervisor from delegating the tasks to others, but specify that the responsibility remains with the on-site supervisor to ensure that the tasks are done. The rule requires a person to be present with overall control over the site. The recommended term, "person of authority" is also undefined and would not provide any additional clarity.

Fort Bend commented that a definition of "multiple collection events" should be added to the rules.

The commission did not make any changes to the rules in response to this comment. The plain meaning of "multiple collection events" is adequate in this instance.

SUBCHAPTER N. HOUSEHOLD MATERIALS WHICH COULD BE CLASSIFIED AS HAZARDOUS WASTES

30 TAC §§335.401 - 335.403, 335.405 - 335.412

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The repeals are also adopted under Texas Health and Safety Code, Chapter 361, concerning Solid Waste Disposal Act.

The repeals implement Texas Water Code, §5.103, §5.105 and Texas Health and Safety Code, Chapter 361.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER N. HOUSEHOLD HAZARDOUS WASTES

30 TAC §§335.401 - 335.403, 335.405, 335.407, 335.409, 335.411, 335.413, 335.415, 335.417, 335.419

STATUTORY AUTHORITY

The new rules are adopted under Texas Water Code, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the Texas Water Code and other laws of this state; under Texas Health and Safety Code, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the Texas Health and Safety Code; under Texas Health and Safety Code, §361.029, which requires the commission to provide rules for persons to engage in activities that involve the collection and disposal of HHW; and under Texas Health and Safety Code, §361.429, which requires the commission to establish standards for HHW collection programs.

The new rules implement Texas Water Code, §5.103 and §5.105 and Texas Health and Safety Code, §§361.017, 361.024, 361.029, and 361.429.

§335.401. Purpose and Applicability.

(a) The purpose of this subchapter is to provide requirements for persons who are involved in any combination of collecting, aggregating, offering for reuse, recycling, transporting, or disposing of household hazardous wastes and other types of household waste materials that may, due to their quantity and characteristics, pose a potential endangerment to human health or the environment if improperly handled.

(b) The requirements of this subchapter apply to persons who engage in any combination of the following activities:

(1) collect, aggregate, or store household hazardous waste for offering for reuse, recycling, processing, or disposal;

(2) provide a point of generation pick-up service;

(3) operate a mobile collection unit;

(4) operate a collection event;

(5) operate a permanent collection center;

(6) transport any aggregated household hazardous waste; and

(7) own or manage a hazardous waste processing, storage or disposal facility that receives household hazardous waste directly from the public or households.

(c) The requirements of this subchapter do not apply to:

(1) persons who receive from households for the purpose of reuse, recycling or reclamation any combination of used oil, batteries, antifreeze, and paint, provided such persons do not collect other household hazardous waste or other household wastes under the requirements of this subchapter;

(2) persons who collect less than 100 pounds of household hazardous waste per year;

(3) retailers who accept from the public only waste items that are of the same type(s) as products sold by the retailer;

(4) collection events organized primarily for the purpose of collecting for processing or disposal pesticides and other wastes from agricultural operations and incidental amounts of household hazardous wastes, if no fees are charged for the collection and if registered transporters are used to haul the collected wastes to hazardous waste processing, storage, or disposal facilities; or

(5) organizations that collect used electronic equipment from the public for reuse, provided such individuals do not make a determination during the collection of whether the electronics are wastes, do not handle the electronics in a manner that renders them useless, and do not collect household hazardous waste or other household wastes covered under the requirements of this subchapter.

(d) Any provisions of this subchapter may be waived by the executive director for emergencies, disasters, or in other circumstances where flexibility from the requirements is necessary to protect public health and the environment.

§335.402. Definitions.

In addition to the definitions in §3.2 of this title (relating to Definitions) and §335.1 of this title (relating to Definitions), the following words and terms, when used in this subchapter, have the following meanings:

(1) Aggregate--The act of bringing together household hazardous waste that, after being separated from other household waste, is collected from two or more households and accumulated at a collection event, permanent collection center, point of generation pick-up service, mobile collection unit, or transporter's facility for the purpose of reusing, recycling, or disposing the material.

(2) Collection event--A one-time or recurrent designation of a site and areas within that site for use by an operator to collect or aggregate household hazardous waste delivered to the site by individuals, households, or collectors and to store the waste for less than 48 hours.

(3) Collector--Any person who accepts from two or more households any waste materials that have been separated from other household waste and offered to the collector because the generator either knows or considers the materials to be household hazardous waste. This term includes persons involved with household hazardous waste collection programs, but does not include persons delivering wastes that have not been aggregated to a collection program with which they are not affiliated.

(4) Hazardous waste processing, storage, or disposal facility--A hazardous waste processing, storage, or disposal facility that has received an United States Environmental Protection Agency (EPA) permit (or a facility with interim status) in accordance with the requirements of 40 Code of Federal Regulations (CFR) Parts 270 and 124, or that has received a permit from a state authorized in accordance with 40 CFR Part 271.

(5) Household--Single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds, and day-use recreational areas.

(6) Household hazardous waste--Any solid waste generated in a household by a consumer which, except for the exclusion provided in 40 Code of Federal Regulations (CFR) §261.4(b)(1), would be classified as a hazardous waste under 40 CFR Part 261. The term has the same meaning as "hazardous household waste."

(7) Inclement weather--Weather that could present a hazard in the operation of a collection event, permanent collection center, mobile collection unit, or point of generation pick-up service, including temperature extremes, high winds, rain, and severe weather.

(8) Mobile collection unit--A vehicle (such as a truck or trailer) that is used to aggregate household waste materials delivered by the public prior to transporting the material to a permanent collection center, collection event, or registered hazardous waste transporter facility.

(9) Operator--A person responsible for the collection, aggregation, and storage of household hazardous waste and household materials at a collection event or permanent collection center, in a point of generation pick-up service or mobile collection unit, or in any combination of collection programs; or, if the context clearly refers to an operator of a hazardous waste processing, storage, or disposal facility, the term has the same meaning as defined in §335.1 of this title.

(10) Permanent collection center--A designated site and facilities used to collect and aggregate household hazardous wastes on an ongoing basis and to store the wastes for 48 hours or longer.

(11) Personnel--All individuals who perform tasks at or oversee the operations of a collection event, permanent collection center, mobile collection unit, or point of generation pick-up service, and whose actions or failure to act may result in noncompliance with the requirements of this subchapter.

(12) Point of generation pick-up service--A service to collect household hazardous waste at generating households, either through direct contact with the generators or by collection of household hazardous waste left at curbside or in another location at the household.

§335.403. General Requirements for Household Hazardous Waste Collections.

(a) Except as provided in subsection (e) of this section, no person may collect or aggregate household hazardous waste that has been segregated from other solid waste, provide point of generation pick-up service, operate a mobile collection unit, operate a collection event, or operate a permanent collection center without having first submitted a current notification to the executive director, in accordance with subsection (b) of this section.

(b) On a form provided by the commission, an operator shall submit a signed notification to the executive director at least 45 days prior to conducting activities covered by this subchapter. For on-going collection programs, such as multiple collection events at a single location, point of generation pick-up services, and permanent collection centers, the notification must be resubmitted whenever the information provided in the notification changes. For multiple collection events and mobile collection units, each location where a collection will be held must be covered in a separate notification, but multiple collections at one location can be covered by a single notification if the same information other than dates applies to each collection. The notification must include the following information:

(1) name and address of the operator;

(2) name, address, and telephone number of an individual to be the contact person for the operator;

(3) date(s) and times of the planned collection(s) or days and hours of operation of a permanent collection center, point of generation pick-up service, or mobile collection unit(s), including inclement weather dates if applicable;

(4) for a collection event, permanent collection center or mobile collection unit, the address of the collection site and the part of the site that will be used for collections;

(5) for a point of generation pick-up service or mobile collection unit, the address of the collection event, permanent collection center, or registered hazardous waste transporter's facility where collected wastes will be delivered, or a statement that the aggregated household hazardous waste will be transported to a hazardous waste processing, storage, or disposal facility by a registered hazardous waste transporter from the collection site;

(6) the name of the person who owns the property where a permanent collection center is located, where a collection event will be held, or where a mobile collection unit will be used; a signed letter that clearly gives permission for the use of the property for the stated purpose must be attached to the notification;

(7) areas that are planned to be covered by the collection effort, i.e., city, county, precinct, neighborhood, district, region, etc.;

(8) the types by waste category of each type of household materials that will be collected;

(9) permanent collection centers (including sites where household hazardous waste will be stored for 48 hours or longer) must include a properly completed TCEQ Core Data Form (Form TCEQ-10400) with the notification; and

(10) the planned disposition of wastes that are received in the collection efforts, including the name(s), address(es), and United States Environmental Protection Agency (EPA) identification number(s) of the transporter(s) to be used and the name, address, and EPA identification number of each recycling and hazardous waste facilities that is planned to receive the wastes collected.

(c) Along with the notification described in subsection (b) of this section, owners or operators of a permanent collection center shall submit an originally signed financial assurance mechanism acceptable to the executive director to provide for proper closure of the site(s). Prior to the notification, owners or operators must provide sufficient information to the executive director to allow the agency to determine an acceptable amount, format and type of financial assurance. Local governments as well as state and federal entities whose debts and liabilities are the debts and liabilities of a state or the United States are not subject to this subsection. Except for those operated by a local government or state or federal entity, a permanent collection center may not operate without obtaining and maintaining financial assurance acceptable to the executive director.

(d) In addition to the other requirements of this subchapter, an operator of a collection event, permanent collection center, point of generation pick-up service, mobile collection unit, or any combination of these:

(1) shall develop and follow a complete operational plan as required in §335.405(a) of this title (relating to Operational Plans) and;

(2) may not collect hazardous waste or Class 1 waste, as defined by this chapter, unless authorized under a permit or authorization issued under this chapter or Chapter 330 of this title (relating to Municipal Solid Waste);

(3) shall ship, for proper processing or disposal, aggregated household hazardous waste only to a hazardous waste processing, storage, or disposal facility that is authorized to receive household hazardous waste and that has agreed to accept the waste, except in cases where aggregated household hazardous waste is shipped to a permanent collection center for the purpose of consolidating aggregated household hazardous waste;

(4) shall have collected household hazardous waste transported in one of the following manners:

(A) any aggregated household hazardous waste from a collection event or permanent collection center must be transported only by a registered hazardous waste transporter under a uniform haz-

ardous waste manifest to a hazardous waste processing, storage, or disposal facility authorized to receive household hazardous waste that has agreed to accept the wastes or as universal waste if allowed under Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule), except in cases where aggregated household hazardous waste is shipped to a permanent collection center for the purpose of consolidating aggregated household hazardous waste;

(B) the operator may transport any household hazardous waste on a point of generation pick-up service or mobile collection unit to a permanent collection center, collection event, or registered hazardous waste transporter's facility; or

(C) the operator may have any household hazardous waste collected by a point of generation pick-up service or mobile collection unit transported by a registered hazardous waste transporter under a uniform hazardous waste manifest to a hazardous waste processing, storage, or disposal facility authorized to receive household hazardous waste that has agreed to accept the wastes or as universal waste if allowed under Subchapter H, Division 5 of this chapter;

(5) shall maintain records related to household hazardous waste collected and processed or disposed for one year after processing or disposal of the wastes; and

(6) shall report annually to the executive director the amounts of household hazardous waste and household materials collected. The operator shall submit the report by April 1st of each year for the previous calendar year, using a form provided by the commission.

(e) Owners or operators of hazardous waste processing, storage, or disposal facilities who accept or intend to accept household hazardous waste directly from households are not subject to the requirements of this subchapter other than the reporting requirements in subsection (d)(6) of this section, provided that the acceptance of household hazardous waste is authorized by their operating permit.

§335.405. Operational Plans.

(a) A person conducting activities under this subchapter shall develop a complete operational plan prior to the collection of household materials and shall revise the plan as needed for ongoing and future operations. The operational plan must accurately depict the specific plan for how all wastes and materials will be handled during and after collection efforts. The operational plan:

(1) must identify the nature, type, and quantity of household hazardous waste and other materials proposed for collection and reuse, recycling, processing or disposal;

(2) must describe the source(s), amounts and types of wastes that would be accepted at a collection event, permanent collection center, point of generation pick-up service, mobile collection unit, or any combination of these, and if the collectors involved in the programs are not under a single operator, must describe the source(s), amounts, and types of wastes that will be transferred by a point of generation pick-up service or mobile collection unit to a collection event or permanent collection center or that will be transferred to a different permanent collection center for consolidation with other household hazardous waste;

(3) must establish the minimum number of operator staff, contractors, volunteers, and other individuals needed to conduct collection operations at each collection event, permanent collection center, mobile collection unit, and point of generation pick-up service covered by the operational plan; the specific functions of each type of staff; and how the training requirements that apply to their functions have been or will be met;

(4) must describe the planned disposition of all waste collected, including the name and United States Environmental Protection Agency (EPA) identification number of the transporter (or transporters) that will haul the aggregated household hazardous waste, and the name, address, and EPA identification number of the hazardous waste processing, storage, or disposal facility (or facilities) to be used for the processing, storage, disposal, recycling for energy recovery, or recycling of the aggregated household hazardous waste. If materials received in usable condition will be offered to persons for reuse, the operational plan must describe in detail the manner in which this will be done. The operator, in developing the plan for the disposition of waste to be received, shall determine the feasibility of managing collected household hazardous waste in the following order of preference:

(A) reuse for the product's intended purpose;

(B) recycling;

(C) recycling for energy recovery;

(D) treatment to destroy hazardous characteristics;

(E) treatment to reduce hazardous characteristics;

(F) underground injection; and

(G) land disposal;

(5) must include a detailed description of procedures to ensure that hazardous waste or Class 1 wastes, as defined in this chapter, are not accepted as household hazardous waste, including but not limited to screening procedures for persons bringing wastes to collections or participating in point of generation pick-up services, survey questions that will be asked of participants, and the amounts or types of wastes that will require further explanation from generators prior to acceptance;

(6) must include methods used to classify and control wastes received, including but not limited to the following:

(A) the waste streams that will be accepted and the types that will be rejected;

(B) the types of shipping containers and the storage areas to be used for each waste stream that will be accepted;

(C) the methods used to categorize wastes prior to packaging for shipment and processing or disposal;

(D) the methods used to handle and identify unknown wastes;

(E) bulking procedures if used;

(F) procedures for handling containers that are unsealed, leaking, or contaminated on their external surface when received; and

(G) procedures for any other wastes with special handling and processing or disposal needs, if any would be accepted, including but not limited to the following:

(i) radioactive materials;

(ii) medical wastes (such as used syringes);

(iii) asbestos;

(iv) polychlorinated biphenyls (PCBs);

(v) explosives;

(vi) compressed gas cylinders; and

(vii) tanks for compressed fuels;

(7) must include a detailed discussion of provisions for inclement weather, including severe weather, rain, wind, and extreme temperatures;

(8) must include a detailed discussion of recordkeeping for the wastes received and shipped for processing or disposal; and

(9) must include the following attachments:

(A) Attachment 1 is a site map constructed to show the features of the collection event site, the permanent collection center, or the site used with a mobile collection unit. The map need not be drawn to scale but must fairly represent the improvements and boundaries of the collection area. The map must be annotated to show flow of traffic, unloading points, location of emergency equipment and vehicles, and waste handling and storage areas.

(B) Attachment 2 is evidence of competency to operate, including experience and qualifications of key personnel and copies of records for all required training in this subchapter for all operator, contractor, or other staff or individuals who will work at any collection event, at any permanent collection center, on any mobile collection unit, in the point of generation pick-up service, or any combination of these covered by the plan.

(C) Attachment 3 is a Health and Safety Plan, including but not limited to the following information:

(i) the location and contents of the first aid kits available on site, in each mobile collection unit, and on each point of generation pick-up service vehicle;

(ii) the location and type of telephones or radios available at the site, on each mobile collection unit, and on each point of generation pick-up service vehicle for summoning emergency assistance and any specific instructions related to usage of this equipment;

(iii) detailed procedures for avoiding and responding to spills of liquid materials and solid materials, including at least the following:

(I) identifying who will respond to different sizes and types of spills (including on-site staff, emergency responders, contractors, etc.);

(II) detailed methods to be used for spill avoidance, control, and cleanup;

(III) decontamination procedures for people and equipment;

(IV) processing or disposal of contaminated materials and other wastes;

(V) types of engineering controls and personal protective equipment available on site and procedures for proper selection and use during spill responses;

(VI) the types and locations of equipment and materials available on site;

(VII) the duties of specific personnel or job functions;

(VIII) evacuation procedures (including at least the collection site and if appropriate the surrounding area); and

(IX) procedures for reporting of spills to local, state, and federal authorities;

(iv) preparation and response procedures for fires, including at least the following:

(I) the location and types of fire extinguishers and other types of fire suppression and prevention equipment available at the site, on each mobile collection unit, and on each point of generation pick-up collection vehicle;

(II) when on-site fire extinguishers and equipment would be used and when the fire department would be summoned;

(III) evacuation procedures (including the site at least and the surrounding areas if appropriate);

(IV) the identity and storage location of any materials to be collected that may require special methods for fire fighting (such as flammable liquids, flammable metals, explosives, compressed gases, aerosol cans, water reactive materials, etc.); and

(V) the availability of a local fire department and whether they can handle the largest fire possible from the planned collection either with available resources or through mutual aid arrangements;

(v) the timing and content of training or briefings on safety to be provided to staff and volunteers prior to their involvement in the waste collection.

(b) The operational plan must be available at a collection event or permanent collection center and at the offices of the entity operating the collection program. The operator shall use the operational plan as a reference in training staff, planning, and conducting collections of household hazardous waste and other materials. The operator shall maintain the operational plan for as long as collection operations are planned and for at least one year after: a collection event occurs, a permanent collection center has closed, or other types activities conducted under this subchapter cease.

(c) The operator shall provide the operational plan to the executive director upon request.

§335.407. Training Requirements.

(a) The operator shall ensure that all individuals conducting activities under this subchapter have been trained in a manner that is appropriate to their duties, using any appropriate combination of training courses as well as the operational plan as a reference for program-specific training. The training must be specific to the operation of the collection event, permanent collection center, mobile collection unit, point of generation pick-up service, or any combination of these for which the individual will have duties. The operator shall ensure that appropriate training is provided to all staff, contractors, and volunteers who participate in the collection, aggregation, storage, or transportation of household hazardous waste and in running operations to make useable materials available for reuse.

(b) The operator shall ensure that training is provided before individuals collect, aggregate, store, or transport household hazardous waste for reuse, recycling, processing, or disposal. The operator shall ensure that all training requirements under this subchapter are met for the individuals performing or responsible for specific duties. The operator shall ensure that volunteers are appropriately trained on the site rules and safety issues related to the operation prior to assisting with any collection.

(c) The training must cover any applicable training requirements in federal and state laws and regulations including:

(1) requirements of the federal Occupational Safety and Health Administration that are pertinent to duties in handling hazardous materials, responding to spills, and other activities;

(2) requirements of the Texas Hazard Communication Act, Texas Health and Safety Code, Chapter 502;

(3) requirements of the United States Department of Transportation for preparing and packaging wastes for transportation that are applicable to the specific work and operation, as specified in this subchapter; and

(4) requirements of EPA regulations at 40 Code of Federal Regulations §265.16.

(d) The operator shall ensure that individuals who handle household hazardous waste after it is unloaded from vehicles delivering it from households and before it is segregated for transport or storage are trained under the requirements of this chapter as if the waste were hazardous wastes.

§335.409. Operation of Collection Events and Permanent Collection Centers.

(a) Location and site setup. The operator shall locate, organize, and operate a collection event or permanent collection center in a manner that safeguards the public health and welfare, physical property, and the environment. At a minimum, for any collection event, permanent collection center, or site where mobile collections units are used, the operator shall:

(1) locate the collection based on the types and quantities of waste to be collected and suitability of the site for collecting the waste;

(2) organize the activities on site in a way that allows incoming wastes to be sorted upon arrival and placed in a controlled area for packaging;

(3) provide an area, not generally accessible to the public, for sorting, packaging, and handling waste that is accepted;

(4) provide parking for the public and for essential project vehicles and queuing for vehicles waiting to offload wastes so as not to interfere with the safe entry and exit of traffic or cause traffic congestion on roads near the site;

(5) prepare for inclement weather, including provisions for sheltering personnel at or near the site during storms;

(6) designate eating, drinking, and smoking areas for personnel working at the event, area, site, or center (the operator shall prohibit such activities in the collection work area); and

(7) keep incompatible wastes separated, including unidentified wastes, prior to and after packaging for further storage or transport;

(b) Personnel and training. The operator shall ensure that personnel who work at a collection event or the permanent collection center are trained to use and follow the operational plan in conducting collection, storage, processing and disposal, and reuse activities. In addition, the operator shall ensure that the following provisions are met:

(1) Personnel who sort and package waste for transport to a hazardous waste facility and who directly oversee and supervise these activities on site must be trained and knowledgeable concerning the incompatibility of various classes of waste and qualified to package waste for transport;

(2) At every collection event and permanent collection center, at least one person trained to classify hazardous waste and competent to perform tests to identify characteristics of hazardous waste (e.g., pH, flammability, etc.) must be utilized to accept or supervise the acceptance of waste;

(3) Personnel handling waste must be instructed in accident prevention; emergency response to fires, explosions, and spills; the proper use of fire extinguishers appropriate to the materials that will be accepted; and the use of protective devices (such as respiratory gear and gloves) to minimize exposure to the household hazardous waste and other materials that would be accepted in the collection;

(4) Packaging and labeling of waste must be supervised by an individual familiar with the United States Department of Transportation (DOT) hazardous materials packaging, placarding, labeling, shipping, and hazardous waste manifest requirements;

(5) At least one person must be on site at times when wastes are handled who is trained to perform general first aid and who is knowledgeable concerning safety measures to be taken in the event of accidental contact with household hazardous waste or other hazardous materials presented for collection; the first aid training must be consistent with courses provided under the auspices of a recognized national safety organization (such as American Red Cross, National Safety Council, etc.) and must be documented with a current certificate;

(6) An on-site supervisor must be available and responsible for initiating an emergency response plan that includes site evacuation procedures. The on-site supervisor also assumes responsibility for accepting any unidentified wastes and insuring proper handling and proper processing or disposal;

(7) The on-site supervisor must have the authority to remove from the site and prohibit re-entry of any person that the supervisor determines may threaten site security or personnel safety;

(8) A collection event or permanent collection center must be manned by an adequate number of individuals who possess the necessary skills and expertise needed to accept, sort, label, and store the waste and to provide on-site supervision and public relations;

(9) When household hazardous waste or other hazardous materials are prepared for transportation, an adequate number of operator or contractor staff must be present and involved who possess the necessary skills and expertise needed to package, store, and manifest the waste; and

(10) At a minimum, all personnel who handle household hazardous waste after it is unloaded from vehicles delivering it from households and before it is segregated for transport or storage will have chemical identification, segregation, and consolidation training and Hazardous Waste Operations and Emergency Response (HAZWOPER) training; all other personnel will have appropriate training pursuant to their duties.

(c) Equipment and materials. The operator shall provide equipment and materials at a collection event or permanent collection center to provide protection, safety and first aid for persons operating the collection, to contain and clean up spills, and to properly handle, classify, store, and label the waste. The operator shall ensure that disposable equipment and materials contaminated during a spill cleanup are handled appropriately for the type of material that was spilled. The operator shall ensure that any contaminated non-disposable equipment and materials are properly decontaminated before removal from the site. At a minimum, the operator shall provide the following equipment and material at every site and vehicle used to collect wastes:

(1) a first aid kit;

(2) a telephone or radio for contacting first responders in the event of a spill, personal injury, etc.;

(3) an eyewash and shower station, or a hosing device;

(4) at least two fire extinguishers appropriate to the wastes accepted; and

(5) sufficient spill containment and absorbent materials to contain a spill of 10% of the anticipated volume of collected liquid waste.

(d) Waste accepted and excluded. The collection program should accept only household wastes. The operator shall take necessary precautions to prohibit the receipt of waste that is defined as a hazardous waste or Class 1 wastes under this chapter. Other requirements related to acceptance or exclusion of wastes are as follows:

(1) The operator shall ensure that a chemist or trained individual knowledgeable in chemical characteristics and incompatibilities identifies any unidentified waste accepted before packaging the waste for transport. Wastes that cannot be identified by the generator or his representative when delivered or through physical assessment by qualified staff may not be packaged until the waste has been analyzed and the appropriate chemical class has been identified.

(2) Announcements and promotional material must state which types of wastes will be accepted and which types of waste will not be accepted at the collection event or permanent collection center. The operator shall provide information to potential participants prior to a collection event or the opening of a permanent collection center and at least annually during the period that a permanent collection center operates. The information provided must include all relevant instructions on the following issues, as well as any other appropriate information that may be useful to the public:

(A) the types and quantities of wastes that will be accepted and that will not be accepted;

(B) instructions for safely packaging and transporting wastes to the collection;

(C) the days and hours of operation and location of the collection site; and

(D) eligibility criteria for who can bring wastes.

(3) The operator shall ensure that waste acceptance decisions are based on the capabilities of the personnel collecting, sorting, and packaging the waste. A generic list of proposed wastes to be accepted and those that will be prohibited must be included in the operational plan. The list must be developed with the intent of minimizing the need for chemical analysis of unidentified wastes.

(4) Empty hazardous material and pesticide containers from households may be disposed of as nonhazardous waste if they are rendered unusable before leaving the collection event or permanent collection center.

(e) Temporary storage. The operator shall ensure that storage areas at a collection event or permanent collection center are operated and maintained so as to provide safe handling and storage of waste awaiting final disposition. The operator shall secure a collection event or permanent collection center to control access by the public. When storing aggregated household hazardous waste:

(1) An operator may not store aggregated household hazardous waste longer than 10 days except under one of the conditions described in subparagraphs (A) - (C) of this paragraph.

(A) The storage facility is an authorized hazardous waste processing, storage, or disposal facility;

(B) The operator requests in writing and obtains a storage time extension from the executive director. The request for an extension must state the reason that waste needs to be stored longer than ten days, the earliest date that the hazardous household waste currently on site was received, and the expected date that the waste will be shipped to a recycling facility or a hazardous waste processing, storage, or disposal facility; or

(C) The operator is operating a permanent collection center, does not accumulate more than 3,000 kilograms of household hazardous waste, and does not store the waste longer than 180 days.

(2) If wastes are stored in original individual containers as received from the public rather than in a proper and correctly labeled shipping container that meets the DOT regulations for hazardous materials in transportation, the operator shall ensure:

(A) that all complete, legible, and correct labels are maintained on individual containers received from the public;

(B) that, if the label on any container of waste received from the public is missing, defaced, or incorrect, information needed for safe storage, transportation, and processing or disposal is marked on that container; at a minimum, this required information must cover all information required by the DOT regulations for hazardous materials in transportation; and

(C) that the date of acceptance of each individual container from the generator is placed on that container.

(3) If wastes are properly prepared for transportation and stored in proper shipping containers that are labeled consistent with the DOT regulations for hazardous materials in transportation, the individual containers received from the public do not need to be marked.

(4) The operator shall maintain records of all stored, processed, or disposed household hazardous wastes for at least one year after shipment of the waste including all the information necessary to complete manifests for the wastes. (Copies of manifests may be used in lieu of a separate record.)

§335.411. Operation of Point of Generation Pick-up Service and Mobile Collection Units.

(a) Point of generation pick-up service. An operator offering point of generation pick-up service for household hazardous waste that has been segregated from other household waste shall:

(1) develop and implement a collection program that minimizes the potential for human and animal exposure to such waste (unless the pick-up procedures involve personal contact with the generator, the operator shall provide instructions to households on details of packaging, labeling, securing, and any other procedures to safeguard humans and animals and to protect the environment from the wastes left out for pick-up);

(2) provide information to potential participants prior to collections. The information provided must include all relevant issues on the following topics, as well as any other appropriate information that may be useful to the public:

(A) the information required in paragraph (1) of this subsection;

(B) eligibility criteria for who can participate in the program;

(C) the types and quantities of wastes that will be and will not be accepted; and

(D) the method households are to use for arranging pickup of their wastes;

(3) organize and operate the collections so as to safeguard the public health and welfare, physical property, and the environment;

(4) have available in each vehicle used for the point of generation pick-up service the following equipment:

(A) a first aid kit;

(B) a fire extinguisher appropriate to the wastes accepted;

(C) a means of communication to summon emergency assistance and the information needed for its use; and

(D) sufficient absorbent to contain a spill of ten percent of the maximum quantity of liquid wastes that the vehicle is designed to hold;

(5) have a person in each collection vehicle who has experience and training in handling hazardous waste, the proper use of fire extinguishers, first aid, waste classification, waste incompatibility, spill prevention, and clean-up safety;

(6) if unknown wastes will be accepted, ensure that the wastes are properly identified and meet one of the following requirements:

(A) have available on the collection vehicle all necessary testing equipment and a person qualified to identify the wastes prior to placing the wastes on the collection vehicle; or

(B) have a method in place on the collection vehicle of isolating separately in a secure manner each container of unknown waste until delivery to a collection event or permanent collection center where the waste(s) will be characterized prior to aggregating with other wastes, if this method is consistent with the United States Department of Transportation (DOT) requirements for hazardous material in transportation.

(b) Mobile collection unit. In addition to the requirements of §335.409 of this title (relating to Operation of Collection Events and Permanent Collection Centers), an operator using one or more mobile collection units to collect household hazardous waste shall:

(1) develop and implement a collection program that minimizes the potential for human exposure to or environmental harm from such waste during collection, storage, and transport;

(2) have at least one person at each collection who has experience and training in handling hazardous waste, the proper use of fire extinguishers, first aid, waste classification, waste incompatibility, spill prevention, and clean-up safety;

(3) maintain on a mobile collection unit involved with a collection the following equipment:

(A) a first aid kit;

(B) a fire extinguisher appropriate to the wastes accepted;

(C) a eye wash and emergency shower or a hosing device;

(D) a means of communication to summon emergency assistance; and

(E) sufficient absorbent and containment to contain a spill of ten percent of all liquid wastes on the largest mobile collection unit at the collection;

(4) if unknown wastes will be accepted, ensure that the wastes are properly identified and meet one of the following requirements:

(A) have available on the mobile collection unit all necessary testing equipment and a person qualified to identify the wastes prior to placing the wastes on the unit; or

(B) have a method in place on the mobile collection unit of isolating separately in a secure manner each container of unknown waste until delivery to a collection event or permanent collection center where the waste(s) will be characterized prior to aggregating with other wastes, if this method is consistent with the DOT requirements for hazardous material in transportation; and

(5) if the mobile collection unit is used to transport household hazardous waste to a hazardous waste processing, storage, or disposal facility, register the mobile collection unit as a transporter and manifest the aggregated household hazardous waste, or ship the household hazardous waste as universal waste if allowed under Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule);

(c) Point of generation pick-up service or mobile collection unit. The operator of a point of generation pick-up service or mobile collection unit shall also:

(1) comply with the personnel requirements in §335.409(b) of this title;

(2) comply with the waste acceptance and exclusion requirements in §335.409(d) of this title;

(3) comply with the temporary storage requirements in §335.409(e) of this title; and

(4) within 72 hours of receipt from the public, deliver collected household hazardous waste to a permanent collection center, collection event, or registered hazardous waste transporter facility to be aggregated with other household hazardous waste, or have the household hazardous waste transported by a transporter that meets the requirements in §335.415 of this title (relating to General Requirements for Transporters) to a hazardous waste processing, storage, or disposal facility that is authorized to accept household hazardous waste that has agreed to accept the wastes or as universal waste if allowed under Subchapter H, Division 5 of this chapter.

§335.413. General Shipping, Manifesting, Recordkeeping, and Reporting Requirements.

(a) Except for those collected reusable materials handled in accordance with the requirements of §335.419 of this title (relating to Reuse of Collected Material) and wastes received at the center which are not household hazardous waste, persons who collect, receive, or aggregate household hazardous waste shall:

(1) utilize only hazardous waste transporters who have notified the executive director with respect to transportation of hazardous waste, who have notified the United States Environmental Protection Agency (EPA) of their involvement in transporting hazardous waste, and who have been issued an EPA identification number, for transporting or shipping household hazardous waste from a collection event or permanent collection center, except for household hazardous waste that is shipped as universal waste under the provisions of Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule), and except in cases where aggregated household hazardous waste is shipped to another permanent collection center for the purpose of consolidating aggregated household hazardous waste;

(2) ship, using a uniform hazardous waste manifest or following the universal waste rules if appropriate to the type(s) of waste(s) being shipped, household hazardous waste from a collection event or permanent collection center only to receivers that are permitted as hazardous waste processing, storage, or disposal facilities with authorization to receive household hazardous waste and that have agreed to accept the waste, except in cases where aggregated household hazardous waste is shipped to another permanent collection center for the purpose of consolidating aggregated household hazardous waste;

(3) package and label household hazardous waste so as to apply the applicable United States Department of Transportation requirements and the requirements contained in §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste) to the household hazardous waste as if it was hazardous waste; and

(4) retain for at least one year from the date of shipment copies of all manifests and bills of lading utilized for the shipment of household hazardous waste, and make the records available to the executive director upon request;

(b) For all wastes received and materials offered for reuse, an operator shall:

(1) report annually to the executive director by April 1st for the previous calendar year the amount of household hazardous waste and other wastes received, including materials offered for reuse and those transferred to another operator, using a form provided by the agency; and

(2) ensure that all wastes received are properly processed or disposed under all federal, state, and local requirements that are applicable to the specific waste; if materials offered for reuse are later shipped for processing or disposal without having been transferred to another person, the materials must be processed or disposed as required for household hazardous waste if they have any characteristic of hazardous waste.

§335.417. General Requirements for Processing, Storage, or Disposal Facilities.

(a) An owner or operator of a hazardous waste processing, storage, or disposal facility may receive in compliance with the permit household hazardous waste shipped under a uniform hazardous waste manifest or as universal waste.

(b) Owners or operators of hazardous waste processing, storage, or disposal facilities may receive household hazardous waste directly from households without meeting any of the other provisions of this subchapter provided that the quantities received are reported to the executive director as described in §335.403(d)(6) of this title (relating to General Requirements for Household Hazardous Waste Collections).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 11, 2008.

TRD-200803575
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 31, 2008
Proposal publication date: February 15, 2008
For further information, please call: (512) 239-2548

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 53. FINANCE

SUBCHAPTER A. FEES

DIVISION 1. LICENSE, PERMIT, AND BOAT AND MOTOR FEES

31 TAC §53.17

The Texas Parks and Wildlife Commission adopts an amendment to §53.17, concerning Miscellaneous Fees, without changes to the proposed text as published in the April 18, 2008, issue of the *Texas Register* (33 TexReg 3161).

The amendment establishes a $25 fee for participation in the mentored hunting program offered by the department. Elsewhere in this issue of the *Texas Register* the department is adopting rules that create a mentored hunting permit for use on department wildlife management areas in conjunction with a hunting workshop. The intent of the mentored hunting permit is to provide an opportunity for persons who are not from traditional hunting backgrounds to learn about and participate in hunting activities on department wildlife management areas.

The amendment will function by establishing a $25 fee for the mentored hunting permit.

The department received three comments opposing adoption of the proposed amendment. Two of the commenters offered a specific reason or rationale for opposing adoption. The comments, accompanied by the department's response, are as follows:

One commenter opposed adoption and stated that the fee for the mentored hunting permit should be the same as that for the annual public hunting permit ($48). The department disagrees with the comment and responds that the mentored hunting permit authorizes one-time access to a wildlife management area to participate in a hunter workshop and subsequent mentored hunt. The annual public hunting permit is a comprehensive permit that allows year-round access to wildlife management areas for hunting and other recreational purposes and therefore the fee for the annual public hunting permit is higher. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be no fee for the mentored hunting permit. The department disagrees with the comment and responds that a minimal fee serves two purposes. The first is to allow the department to defray the expense of creating and administering the mentored hunting program, which allows the opportunity for more people to participate in the program. The second is to avoid the waste of department resources and time by people who indicate that they would like to attend and then don't. The department believes that a nominal fee encourages people to attend. No changes were made as a result of the comment.

The department received nine comments supporting adoption of the proposed amendment.

The Texas Wildlife Association commented in support of adoption of the proposed amendment.

The amendment is adopted under the authority of Parks and Wildlife Code, §81.403, which authorizes the department to issue permits authorizing access to public hunting land or for specific hunting, fishing, recreational, or other use of public hunting land or wildlife management areas; requires the conditions for the issuance and use of such permits to be prescribed by rule; and requires the department to charge a permit fee by rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 8, 2008.

TRD-200803503
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: July 28, 2008
Proposal publication date: April 18, 2008
For further information, please call: (512) 389-4775

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CHAPTER 57. FISHERIES
SUBCHAPTER C. INTRODUCTION OF FISH, SHELLFISH AND AQUATIC PLANTS

31 TAC §§57.251 - 57.253, 57.258, 57.259

The Texas Parks and Wildlife Commission adopts amendments to §§57.251 - 57.253, 57.258, and 57.259, concerning Introduction of Fish, Shellfish and Aquatic Plants. Section 57.253, concerning Permit Application, and §57.258, concerning Prohibited Acts, are adopted with changes to the proposed text as published in the April 18, 2008, issue of the *Texas Register* (33 TexReg 3164). Sections 57.251, 57.252, and 57.259 are adopted without change and will not be republished.

The change to §57.253 alters subsection (c)(2)(B)(iv) to make a more generic statement concerning compliance with General Land Office regulations as a prerequisite for permit issuance. The proposed provision requires "approval from the General Land Office to install an offshore aquaculture facility in state waters." The rule as adopted has been changed to simply require that an applicant to obtain any necessary approval from the General Land Office.

The change to §57.258 inserts the word "or" between paragraphs (5) and (6) to make clear that each offense listed in the section is a separate offense by itself.

Parks and Wildlife Code, §12.015, requires the department to regulate the introduction and stocking of fish, shellfish, and aquatic plants into the public water of the state. Under Parks and Wildlife Code, §66.015, the department is required to adopt rules governing the issuance of permits for the introduction of fish, shellfish, and aquatic plants into public waters. Additionally, Agriculture Code, Chapter 134, requires the department to adopt rules to carry out its duties under that chapter.

The department's statutory responsibility is to protect the health and viability of native populations of fish, shellfish, and aquatic life in state waters, including endangered species. Although offshore aquaculture is being practiced elsewhere in the world, it is in its infancy in the United States in general and the Gulf of Mexico in particular.

In November 2006, the Texas Parks and Wildlife Commission adopted rules to govern offshore aquaculture activities in Texas waters. Since that time, persons with a prospective engagement in offshore aquaculture have suggested changes to the rules that would make administrative processes more tractable and therefore more conducive to the establishment of offshore aquaculture activities in Texas.

The amendment to §57.251, concerning Definitions, alters the definition of "disease condition" to eliminate the 5% mortality rate set forth in paragraph (3)(B) as a determinative criteria for the assumption of a disease condition. Instead, the rule requires that a department-approved aquatic veterinarian be consulted within 48 hours of the discovery that a mortality rate of 5% or more has occurred in an enclosure within a seven-day period. The 48-hour notification was chosen because a longer time period would potentially allow for an epidemiologically unacceptable risk to native resource populations in public waters. The new provision is added as §57.252(e)(5).

The amendment to §57.252, concerning General Provisions, alters subsection (a) to enable the department to issue permits to corporations, companies, and other entities that meet all legal requirements for doing business in Texas.

Current §57.252(e)(5) provides that in the event a disease condition is discovered or a necessary permit is suspended or revoked, the department has the option of ordering removal of stock from an offshore aquaculture facility. The amendment to §57.252(e)(6) gives the department more flexibility in dealing with these issues, by providing that the department may take "other appropriate action" in addition to or instead of ordering removal of stock.

The amendment to §57.253, concerning Permit Application, alters subsection (c)(2)(B)(iv) to require that an applicant acquire any necessary approval from the General Land Office prior to applying for an offshore aquaculture permit.

The amendment to §57.253(d) allows the issuance of an offshore aquaculture permit to an entity that possesses a certificate of existence from the Texas Secretary of State and a franchise tax certification of account status from the Texas Comptroller of Public Accounts. The amendment would reduce potential or perceived administrative complexity for prospective offshore aquaculturists.

The amendment to §57.253 also adds new subsection (e) to authorize the department to request any additional information from an applicant necessary to evaluate the impact of a prospective offshore aquaculture operation. The amendment facilitates the department's investigations in determining whether a prospective offshore aquaculture operation poses minimal risk to native populations and systems.

The amendment to §57.253(f) establishes an informal review process for permittees who wish to seek review of a department decision to deny a permit application or to refuse to renew a permit issued under the subchapter. The amendment requires the department to notify a permittee upon a department determination to deny or suspend a permit. A permittee would then have ten working days from receipt of notification to request a review of such a decision. The review panel would consist of the director and deputy director of the Coastal Fisheries Division and the Deputy Executive Director for Operations (or his or her designee). The review panel would be required to make a determination within ten working days and the decision of the review panel would be final. The amendment provides an internal mechanism for review by senior agency managers in the event that a permittee contests a department decision to deny a permit application or to refuse to renew a permit.

The amendment to §57.258, concerning Prohibited Acts, makes it an offense for a permittee to construct an offshore aquaculture facility in a manner different from that indicated in an approved application. The current rule requires construction of the offshore

aquaculture facility prior to issuance of a permit. Concern has been expressed that the existing rule inhibits project financing, since capital outlays would be required before all permits were secured. Accordingly, the proposed rule would allow issuance of the permit prior to construction. Adding the offense of construction in violation of the permit will help assure satisfactory facility construction.

The amendment to §57.259, concerning Violations and Penalties, allows for suspension or revocation of permits in the event of violations. The amendment refers to the statutory requirements in Government Code, Chapter 12, as the permittee's procedural recourse in the event the permittee wishes to challenge the department's intended suspension or revocation of a permit.

The department received one comment opposing adoption of the proposed rules. The commenter did not articulate a reason or rationale for opposing adoption. The department disagrees that the rules should not be adopted. No changes were made as a result of the comment.

The department received eight comments supporting adoption of the rules.

The Gulf Marine Institute of Technology and Bio-marine Technologies commented in support of adoption of the rules.

The amendments are adopted under Parks and Wildlife Code, §12.015, which requires the department to regulate the introduction and stocking of fish, shellfish, and aquatic plants into the public water of the state; §61.052, which requires the department to regulate taking or possessing aquatic animal life; §66.015(c), which requires the department to establish rules related to the issuance of permits for the introduction of fish, shellfish, or aquatic plants into the public water of the state; and Agriculture Code, §134.005, which requires the commission to adopt rules necessary to carry out its responsibilities under that chapter to regulate aquaculture.

§57.253. Permit Application.

(a) An applicant for a permit under this subchapter shall complete and submit an application to the department on a form supplied by the department, accompanied by the fee prescribed by §53.15 of this title (relating to Miscellaneous Fisheries and Wildlife Licenses and Permits).

(b) Except for applications for offshore aquaculture permits, an application must be received by the department at least 30 days before the proposed introduction.

(c) An application for an offshore aquaculture facility:

(1) must be received by the department at least 90 days prior to the proposed deployment of any enclosure or infrastructure;

(2) must include:

(A) The name, address, and telephone number of the owner(s) of the facility and all stock;

(B) proof that the applicant has obtained:

(i) a valid license issued by the Texas Department of Agriculture to operate an aquaculture facility (Agriculture Code Chapter 134);

(ii) all applicable state and/or federal permits or authorizations relating to water quality standards;

(iii) all applicable state and federal permits, authorizations, or clearances related to navigational hazards; and

(iv) any approval or permit required by the General Land Office;

(C) a clear and concise facility design, including scale plans and schematics of all infrastructure that, as determined by the department, is sufficient to:

(i) prevent the escape of stock from the facility; and

(ii) protect wildlife resources adjacent to the facility from:

(I) disease transmission from stock;

(II) the discharge of pollutants produced from feed or waste materials into public waters, including discharges resulting directly or indirectly from extreme weather conditions or physical collision;

(III) the escape of stock from the facility as a result of extreme weather conditions or physical collision; and

(IV) death or injury from ensnarement, entanglement, collision, or other physical interactions with enclosures or facility infrastructure;

(D) a clear and concise operations plan, which shall include best management practices that minimize potentially harmful discharges into public waters from the facility;

(E) a prospective timeline of proposed activities, by species, from the time of introduction to the time of harvest or removal for each enclosure;

(F) a plan for removing all stock from the facility within 72 hours of notice from the department under §57.252 of this title (relating to General Provisions); and

(G) a statement that all stock meets the requirements of §57.252 of this title.

(d) If the application is in the name of an entity other than an individual person or persons, the application must include a certificate of existence from the Texas Secretary of State and a franchise tax certification of account status from the Texas Comptroller of Accounts.

(e) The department may require the applicant to submit any other information that the department determines is necessary to evaluate the application or protect state resources.

(f) An applicant for a permit under this subchapter may request a review of a decision of the department to refuse issuance of a permit or permit renewal.

(1) An applicant seeking review of a decision of the department with respect to permit issuance under this subchapter shall first contact the department within 10 working days of being notified by the department of permit denial.

(2) The department shall conduct the review and notify the applicant of the results within 10 working days of receiving a request for review. The decision of the review panel shall be final.

(3) The request for review shall be presented to a review panel. The review panel shall consist of the following:

(A) the Deputy Executive Director for Operations (or his or her designee);

(B) the Director of the Coastal Fisheries Division; and

(C) the Deputy Director of the Coastal Fisheries Division.

§57.258. Prohibited Acts.

Except as provided in this subchapter, it is an offense if:

(1) a person holding a permit under this section fails to notify the department at least three calendar days prior to the placing of any fish, shellfish, or aquatic plant into public water;

(2) a person holding a permit under this section fails to notify the department at least three calendar days prior to removing any fish, shellfish, or aquatic plant from an offshore aquaculture facility;

(3) a person holding a permit under this section fails to notify the department immediately upon discovering that a disease condition exists within an offshore aquaculture facility;

(4) a person holding a permit under this section fails to notify the department immediately upon determining that an offshore aquaculture facility has been damaged and the threat of the unintentional release of stock exists;

(5) any person to whom the department has issued an offshore aquaculture permit fails to remove all enclosures and associated infrastructure from public waters within 10 calendar days of permit expiration or revocation; or

(6) a permittee constructs an offshore aquaculture facility in a manner different from the department-approved application.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 9, 2008.

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Ann Bright
General Counsel
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For further information, please call: (512) 389-4775

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CHAPTER 65. WILDLIFE
SUBCHAPTER H. PUBLIC LANDS PROCLAMATION

31 TAC §§65.191, 65.193, 65.194

The Texas Parks and Wildlife Commission adopts amendments to §§65.191, 65.193, and 65.194, concerning the Public Lands Proclamation, without changes to the proposed text as published in the April 18, 2008, issue of the *Texas Register* (33 TexReg 3167).

The Parks and Wildlife Code authorizes the department to issue permits for hunting in wildlife management areas and to establish a fair method for distribution of those permits. Tex. Parks & Wild. Code §81.403(a). Also, department employees are charged with providing outreach and education to "increase the participation in outdoor recreation . . . consistent with the mission and goals of the department." Tex. Parks & Wild. Code §11.0181. The department's mission includes providing "hunting and fishing and outdoor recreation opportunities for the use and enjoyment of present and future generations."

In an effort to increase participation in hunting and provide additional hunting opportunities, the amendments to §65.191 and §65.193 create and implement a new type of public hunting permit, the Mentored Hunting Permit (MHP). This pilot program would offer limited opportunities on a first-come, first-served reservation basis to persons interested in participating in a multi-day workshop on a department wildlife management area (WMA) that would teach hunting skills, safety, ethics, game processing and preparation, elements of habitat management, and provide guidance and advice for finding future hunting opportunities. As part of the workshop, participants would have the opportunity to participate in a mentored hunt on a WMA, accompanied by an experienced hunter. The pilot program is intended to explore possible initiatives to increase hunter recruitment. The mentored hunter program could be an effective vehicle for providing the opportunity for persons who are not from traditional hunting backgrounds to learn about and participate in hunting activities.

Among the permits that allow for access to WMAs is the Field Trial Permit, which authorizes permit holders to participate in competitive events on a WMA in which the skills of hunting dogs are tested. The amendment to §65.194, concerning Competitive Hunting Dog Event (Field Trials) and Fees, allows event spectators to be named on the permit and therefore be exempt from access permit fees. The department issues an average of two field trial permits per year. These events are staged by trial groups and are attended by handlers, trainers, officials, and spectators. Spectators are typically persons who have dogs in training and wish to observe the progress of their dogs. Under current rule, dog handlers and officials are exempt from access permit fees, but not spectators. There is no regulatory criterion for distinguishing a spectator from a handler or official. Rather than developing a definition to distinguish spectators from handlers and officials and attempting to enforce it, which would not be cost-effective, the department has determined that it would be more effective to allow spectators to be listed on the field trial permit and thereby exempted from the access permit requirement. The field trial permittee already pays a permit fee of between $100 and $500 per day (based on the number of participants) and must have $250,000 in liability insurance (personal injury and property damage) and a $5,000 performance bond; therefore, spectators should be exempt from access fees, provided their names and social security numbers are on the list required to be kept by the field trial permittee. Both state and federal laws regarding child support collection require the department to obtain social security numbers for each person to whom a recreational license is issued. Tex. Fam. Code §§231.302, 42 U.S.C. §666.

The amendment to §65.194 also updates a reference to Chapter 53, Subchapter A, which has been retitled since the last time §65.194 was amended.

The amendments to §65.191 and §65.193 will function by establishing the mentored hunting permit and providing for its use. The amendment to §65.194 will function by eliminating the access permit requirement for spectators at field dog trials held on wildlife management areas.

The department received four comments opposing adoption of the proposed amendments. One of those commenters provided a specific reason or rationale for opposing adoption. The commenter stated that there should be no fee for the mentored hunting permit. The department disagrees with the comment and responds that a minimal fee serves two purposes. The first is to allow the department to defray the expense of creating and administering the mentored hunting program, which allows the opportunity for more people to participate in the program. The sec-

ond is to discourage people from applying for a mentored hunting workshop and then failing to attend, which results in the waste of department resources and time. No changes were made as a result of the comment.

The amendments are adopted under the authority of Parks and Wildlife Code, §81.403, which authorizes the department to issue permits authorizing access to public hunting land or for specific hunting, fishing, recreational, or other use of public hunting land or wildlife management areas; requires the conditions for the issuance and use of such permits to be prescribed by rule; and requires the department to charge a permit fee by rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 8, 2008.

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 815. UNEMPLOYMENT INSURANCE

The Texas Workforce Commission (Commission) adopts amendments, without changes, to the following section of Chapter 815, relating to Unemployment Insurance, as published in the May 16, 2008, issue of the *Texas Register* (33 TexReg 3918):

Subchapter B. Benefits, Claims and Appeals, §815.18

The Commission adopts the following new subchapter, without changes, to Chapter 815 relating to Unemployment Insurance, as published in the May 16, 2008, issue of the *Texas Register* (33 TexReg 3918):

Subchapter E. Confidentiality and Disclosure of State Unemployment Compensation Information, §§815.161 - 815.168

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the adopted Chapter 815 rules change is to:

- comply with final rules setting forth the statutory confidentiality and disclosure requirements of Title III of the Social Security Act (SSA) and the Federal Unemployment Tax Act (FUTA) concerning unemployment compensation (UC) information issued by the U.S. Department of Labor (DOL) on September 27, 2006, in 20 Code of Federal Regulations (C.F.R.) Part 603; and

- implement House Bill (HB) 2120 and Senate Bill (SB) 1619, enacted by the 80th Texas Legislature, Regular Session (2007), which address certain federal requirements, as enumerated in 20 C.F.R. Part 603.

The federal rules relating to confidentiality of UC information require state law to:

- contain provisions that are interpreted and applied consistent with federal definitions of "identifying information";

- provide penalties for disclosure of confidential UC information; and

- define "public domain information" to clarify how such information is held in Texas.

By amending Texas Labor Code §301.081 and adding new §301.085, HB 2120 and SB 1619:

- mirror the federal interpretation of identifying information under 20 C.F.R. §603.4;

- make unauthorized disclosure of such information a Class A misdemeanor; and

- establish that UC information is not public information for purposes of Chapter 552, Texas Government Code, thereby making UC information not subject to the Texas Public Information Act.

Federal regulations authorize states to implement specific details and to adopt state law with more stringent confidentiality provisions than those imposed by the final regulations. HB 2120 and SB 1619 direct the Commission to adopt rules regarding confidentiality of UC information.

The federal regulations generally provide that all employment and/or wage information is confidential and must not be disclosed. However, because sharing UC information is necessary for the proper administration of the UC program, disclosure to certain entities has been deemed mandatory. These entities include claimants and employers, the Internal Revenue Service (for purposes of UC tax administration), and U.S. Citizenship and Immigration Services (for purposes of identifying a claimant's immigration status). In addition, federal UC law also requires disclosure of state UC information to certain federal UC and benefits programs. SSA also requires disclosure of specific information to various specified state and federal agencies in administration of the agencies' programs. The confidentiality and disclosure requirements in SSA Title III relating to UC information are conditions for receipt of grants by the states for UC administration. The disclosure requirements in FUTA are conditions required of a state in order for employers in that state to receive credit against the federal unemployment tax under 26 United States Code §3302.

There are certain circumstances under which otherwise confidential UC information can be disclosed, but only if such disclosure is authorized by state law and does not interfere with the efficient administration of the state's UC program. Federal regulations specifically provide that the confidentiality requirement of 20 C.F.R. §603.4 does not apply to public domain information as that term is defined at §603.2(c). The federal regulations allow for disclosure of UC information only if state law provides sufficient protections regarding the payment of costs, safeguards, and data-sharing agreements. For example, provided sufficient protections are in place, states are permitted to disclose UC information:

- to public officials in the performance of their duties;

- to agents or contractors of public officials; or

- on the basis of informed consent.

Notwithstanding the general rule that all UC information is confidential and barred from disclosure, federal regulations make disclosure mandatory to a number of entities, primarily governmental, beyond the obvious claimants and employers, because it is either necessary for the proper administration of the UC program or SSA mandates that certain specified information be disclosed to these other entities. Beyond these mandatory disclosures, states have significant latitude above the federal floor and may have more stringent confidentiality provisions than imposed by federal regulations.

Several factors are key in weighing options related to disclosure of this information. As DOL notes in the regulations' preamble, "Confidentiality is necessary to avoid deterring individuals from claiming benefits or exercising their rights, to encourage employers to provide information necessary for program operations, to avoid interference with the administration of the UC program, and to avoid notoriety for the program if program information were misused."

Historically, the Agency's practices have provided the greatest level of confidentiality to UC information in order to ensure a fair system in which all parties are willing and able to participate. Retaining policies that reflect this conservative approach ensures consistency with federal regulations. Without reasonable and effective confidentiality of this information, a chilling effect may result at all stages of UC proceedings if participants believe the Agency cannot effectively maintain as confidential the often highly personal information divulged. Accordingly, maintaining the status quo retains the guiding principles of federal law, including treating all appeals records as confidential.

Another increasingly important factor in deciding how to treat confidential UC information is the potential for identity theft and the considerable harm (financial and otherwise) the release of such information could cause UC program participants. In deciding what type of UC information to release, the Commission has weighed these benefits and risks, including:

- public access to open administrative hearings and related information;

- chilling effect on individuals and employers exercising appeal rights under UC law;

- staff time and costs necessary to redact the requested records given the broad definition of "identifying information";

- significant risk of inadvertent errors in redaction; and

- potential for identity theft if UC records are released.

In recognition of these factors, and consistent with current practices, the Commission has determined that only UC information considered public domain or otherwise expressly exempted may be released.

Public domain information is generally considered exempt from the UC confidentiality requirements. The final federal rules offer states some flexibility in defining the term public domain information. According to the federal regulations, public domain information includes:

- information about the organization of the state, the state UC Agency, and appellate authorities, including the names and positions of officials and employees;

- information about the state UC law (and applicable federal law), provisions, rules, regulations, and interpretations thereof, including statements of general policy and interpretations of general applicability; and

- any agreement, including interstate arrangements and reciprocal agreements and any agreements with DOL related to the administration of the state UC law.

In the proposed federal rules, the possibility existed that appellate records and decisions could qualify as "statements of general policy" within the definition of public domain information set out in 20 C.F.R. §603.2. The Commission commented on these proposed federal rules, concerned that DOL would interpret these regulations to require a state to treat entire appeals records and decisions as public domain information. Such a practice would be at odds with current policy. The Commission determines certain cases to be of precedential value and includes a digest of each selected case in the Commission Appeals Policy and Precedent Manual. Thereafter, only the de-identified digests of Commission-approved precedents are treated as public domain information, while appeals records and fact-specific decisions are withheld. These digests have traditionally been available to the public and may be accessed on the Agency's Web site at www.texasworkforce.org.

In 20 C.F.R. §603.2, DOL removed appeals records and decisions from the definition of public domain information, establishing that the public does not necessarily have a right of access to appeals records and decisions, and ensuring that some appeals information such as Social Security numbers remains confidential. In fact, DOL noted in its preamble to the final rules that, "States may keep appellate records confidential even though the rule does not require it." As a result, the Commission has opted to deem entire appellate records as confidential and will continue to release de-identified digests of Commission-approved precedents.

This practice is supported by provisions of the Texas Government Code and rulings by the Texas Office of the Attorney General (OAG). Under §552.107(1), Texas Government Code, certain legal matters are considered privileged and thus are not subject to disclosure. The case analyses rendered by Commission appeals attorneys in furtherance of professional legal services to the Commission have been protected from disclosure under §552.107(1). Once OAG makes a decision for a governmental body concerning the disclosure of a specific, clearly delineated category of information, that governmental body need not seek future OAG decisions regarding its ability to withhold such information, provided the elements of law, fact, and circumstances on which the decision was based have not changed in subsequent information requests. Such rulings that a governmental body may rely on are known as "previous determinations." Before Texas enacted the law making UC information privileged, not public, for purposes of the Public Information Act, OAG granted the Agency two previous determinations. Both ruled that a confidential case analysis rendered by Commission appeals attorneys in furtherance of professional legal services to the Commission is an exception to disclosure, pursuant to Texas Government Code §552.107(1).

In these adopted rules, the Commission has chosen to maintain the status quo in Commission operations by:

- using the definition of public domain information set forth in 20 C.F.R. §603.2(c), as interpreted by the Commission and allowing

appropriate Agency organization information, Texas UC law, and any Texas UC administration agreements to be released;

- continuing the practice of holding entire appeals records and decisions as confidential and not releasable; and

- continuing the current practice of releasing de-identified Commission-designated precedent case digests as statements of general applicability under the definition of public domain information.

Disclosure of confidential UC information is permissible under certain exceptions if authorized by state law and if such disclosure does not interfere with the efficient administration of the state UC law. Disclosure to individuals and employers of their own confidential UC information, provided it is for UC purposes, is required under 20 C.F.R. §603.6(a). For example, a claimant's UC information can be released to that particular individual; likewise, employer information can be disclosed to that specific employer. The federal regulations also permit disclosure of such information for non-UC purposes under certain specified circumstances. However, DOL makes clear that these disclosures for non-UC purposes must be subject to cost reimbursement, as grant funds may not be used to pay for such disclosure costs. These proposed rules allow claimants or employers access to their own UC information, even if the request is for non-UC purposes, subject to cost reimbursement, unless such access could conflict with the administration of UC such as releasing a confidential informant's name or attorney-client privileged information. The federal regulations also permit states to disclose confidential UC information, including identifying information, to an employer or claimant's agent, upon presentation of a written release from the particular individual or employer. Or, when a written release is impossible or impracticable to obtain, the agent can present such other form of consent as is permitted under state law.

Federal rules treat an elected official performing services for a constituent regarding UC matters as the individual's or employer's agent. DOL reasons that when an elected official is acting in response to a constituent's inquiry about a UC matter, such as that individual's UC claim, the elected official is acting on the individual's behalf and thus is effectively the individual's agent in resolving claim-related issues. But because elected officials may receive requests for assistance that do not specifically authorize the disclosure of confidential UC information, even though such disclosure is necessary for the official to adequately respond to the constituent, DOL revised its final rule to permit the elected official to present reasonable evidence of a request for assistance rather than the "written release." Reasonable evidence of a request for assistance might be a letter from the individual or employer requesting assistance or a written record of a telephone request from the individual or employer. DOL explained that in most cases a request for assistance from a U.S. congressman in reviewing a particular claim includes such reasonable evidence and it is unnecessary to request further evidence.

Attorneys retained in a UC matter to represent an individual or employer are also treated as agents of that individual or employer. Because DOL recognized an attorney has legal and ethical obligations, DOL agreed that an attorney's assertion that he or she has been retained to represent an individual or employer on a UC matter is sufficient to authorize the disclosure of the client's confidential UC information to the attorney.

As adopted herein, the Commission has chosen to treat confidential UC information as releasable to an agent when informed consent is obtained, including the allowable disclosures to:

- elected officials performing constituent services, upon presentation of a written release or reasonable evidence that the individual or employer has authorized such disclosure;

- attorneys retained for purposes related to state UC law, if the attorney asserts that he or she is representing the individual or employer; and

- other, non-attorney agents, such as an individual's representative or an employer service agent, provided the required consent is obtained.

Because of the greater potential threat to employer or individual privacy posed by an entity's collection, storage, maintenance, use, and possible misuse of confidential UC information, DOL believes that additional protections, such as a conditional written release, are necessary for these types of third-party disclosures. The federal rules impose certain requirements upon this category of disclosure, including:

- cost reimbursement;

- safeguard and security requirements;

- written, enforceable agreements;

- imposition of penalties for the misuse of data; and

- maintenance of systems sufficient to allow an audit.

The provisions of HB 2120 and SB 1619 impose criminal penalties for the unauthorized use of a claimant's or employer's identifying information, thus meeting a key element of the federal regulations. The Agency obtains written agreements to ensure the information will be kept confidential. These written agreements include provisions for:

- monitoring contractor usage of UC information (including site visits); and

- obtaining reimbursement of costs.

The Agency exchanges information with numerous contractors. Accordingly, certain threshold standards must be met by all third parties to ensure compliance with federal law. At a minimum, the third party must acknowledge that unauthorized release of the UC information could result in the imposition of criminal penalties. But, given the range of potential risks posed by different contractors, safeguarding the release of confidential information will require additional measures above the basic minimum federal standards. However, the Commission also recognizes the important role the Local Workforce Development Boards (Boards) play in administration of workforce programs. Accordingly, to facilitate Boards' oversight and administration of service delivery and eligibility determinations for workforce services, the Commission permits the release of otherwise confidential employer and claimant information to Texas workforce system contractors and Board contractors for the administration of workforce programs, as appropriate, pursuant to a written agreement containing the safeguards identified in 20 C.F.R. §603.9 and §603.10.

One effective approach, used in the Agency's current monitoring and safeguard agreements, is to perform an individualized risk assessment. Accordingly, these rules establish general categories and parameters to govern the authorized use of UC information, based upon a risk assessment of disclosure by a par-

ticular contractor. Likewise, the Agency will continue to draft individual agreements tailored to address such issues as the specific methods of release, the use of the information, and auditing requirements. Such contracting details are developed on an operational level, but will reflect the guiding principles reflected in these adopted rules.

Contractors of other local, state, or federal public officials may seek access to identifying information. The federal regulations define a public official as "an official, agency, or public entity within the executive branch of federal, state, or local government that has responsibility for administering or enforcing a law, or an elected official in the federal, state, or local government." As long as the use of this information is related to the administration of governmental or legal functions, the Commission will permit access to any contractor of any other local, state, or federal public official. These activities may include research related to the law administered by the public official. However, prior to releasing identifying information to any contractor of any public official, the Agency must:

(1) enter into a written agreement with the public official on whose behalf the agent or contractor will obtain information that holds the public official responsible for ensuring that the agent or contractor complies with the safeguards in 20 C.F.R. §603.9, and provides for termination if the state or state UC agency determines that the entity does not follow the safeguards in the agreement;

(2) ensure that appropriate monitoring, based on a risk assessment analysis that includes performing on-site inspections of the agency, entity, or contractor, is in place to ensure that the requirements of the state's law and the agreement to maintain confidentiality in contract required by 20 C.F.R. §603.10 are met;

(3) recoup the costs required to set up the agreement, provide the information, monitor the use, and investigate breaches of the agreement; and

(4) devote staff time to the above activities within the current full-time equivalent cap of the Agency.

The Commission permits the release of otherwise confidential employer and claimant information to nonpublic contractors of federal, state, and local entities, but only on an individualized basis. Under the federal regulations, the Commission must ensure that all costs are recovered up front. Accordingly, these adopted rules allow a risk assessment analysis of each contractor's business practices and uses of confidential UC information, to ensure that where release is appropriate, contracts are tailored to each contractor.

Pursuant to the newly adopted federal regulations, an employer's or individual's agent may access the client's UC information to the same extent as the client, provided the agent first secures written authorization from the employer or individual the agent represents. However, the standards for release are quite different if the requesting entity is a non-agent third party. A non-agent third party lacks written authorization from the employer or individual and typically seeks access to confidential information for business or research purposes.

DOL's final rules recognize that additional protections are needed for releases to non-agent third parties because of the greater potential threat to employer or individual privacy posed by the entity's collection, storage, maintenance, use, and possible misuse of confidential UC information. In particular, DOL stressed that the purpose specified in the release must be limited to providing a service or benefit to the individual signing the release or to carrying out the administration or evaluation of a public program to which the release pertains; if the release does not meet these requirements, the state may not disclose confidential UC information under this exception to disclosure.

As noted above, HB 2120 and SB 1619 satisfy the federal criminal penalty requirements for misuse of UC data, under Texas law, unauthorized release of this information is a Class A misdemeanor. However, the Agency must ensure that requestors maintain sufficient systems to allow for audit of disclosed information and to allow the Agency to monitor the use, storage, and destruction of the information. Historically, the Agency has not provided such access because previously state law did not impose any criminal penalties for unauthorized use or release of UC information, and the cost and staff time necessary to ensure the non-agent complied with federal requirements was prohibitive. Although releases to non-agent third parties are subject to the same four safeguards applicable to government contractors, such releases are not statutorily mandated. Accordingly, the Commission has chosen to continue its current practice of allowing non-agent third parties access to confidential UC records only on a strict case-by-case basis, rather than on an ongoing or, in particular, electronic online basis. In each instance, as a comprehensive written agreement is developed, the costs of monitoring compliance and the risks of improper use must be fully evaluated and built into the agreement, as well as recovered in full up front.

As previously noted, 20 C.F.R. §603.6(a) requires disclosure to individuals and employers of their own confidential UC information, provided such is for UC purposes. Currently, disclosure of confidential UC information to parties is separately required under the terms of the Narcisco Gutierrez, et al. vs. TWC (Gutierrez) settlement. On August 13, 1998, a full and final settlement was implemented between the parties. In part, the settlement requires the Commission to provide "relevant separation and timeliness information in the Commission's custody, as a matter of routine, to both parties (the claimant and the employer) with the Notice of Hearing it currently sends out." Thus, prior to the hearing, the Agency must mail to both parties all fact-finding statements relating to the work separation and the appeal. Moreover, the Gutierrez agreement requires the mutual exchange of otherwise confidential information in hearings. The terms of the agreement are contractual, binding upon the Commission, and do not expire.

Adopting rules to explicitly allow the sharing of confidential identifying UC information addresses a unique challenge concerning release of certain information where the claimant has been a victim of family violence or stalking. Section 207.046(a)(2), Texas Labor Code, provides that a claimant is not disqualified from receiving UC if that individual left the workplace to avoid family violence or stalking, provided certain evidentiary standards are satisfied. Section 207.046(b), Texas Labor Code, provides, "except as provided by law," such evidence may not be disclosed to any person without the affected claimant's consent.

Arguably, §207.046(b), Texas Labor Code, could be read to prohibit the Agency from meeting Gutierrez requirements because the Agency likely lacks the claimant's consent to provide relevant separation information to both parties in some hearings. Conversely, failure to provide pertinent information to both parties prior to the hearing could hamper administrative process rights if both parties were not fully apprised of the issues prehearing, possibly resulting in inadequately prepared participants. Specif-

ically allowing the sharing of this information with all hearing parties by rule satisfies Gutierrez without violating §207.046(b). Establishing this practice in rule will ensure the disclosure of UC records to a hearing party, meet the terms of the Gutierrez settlement agreement, and avoid any legal challenges related to the release of this information in such circumstances.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER B. BENEFITS, CLAIMS AND APPEALS

The Commission adopts the following amendments to Subchapter B:

§815.18. General Rules for Both Appeal Stages.

Section 815.18(2) is reorganized as §815.18(2)(A).

New §815.18(2)(B) states that the Agency shall provide copies of the relevant separation and timeliness information in its custody to both parties with the Notice of Hearing, including:

(i) all information received from the parties in response to, or in protest of, a claim for unemployment insurance;

(ii) all fact-finding statements relating to the work separation; and

(iii) the appeal from the determination of the work separation.

SUBCHAPTER E. CONFIDENTIALITY AND DISCLOSURE OF STATE UNEMPLOYMENT COMPENSATION INFORMATION

The Commission adopts new Subchapter E, as follows:

§815.161. Scope and Purpose.

Section 815.161(a) states that the purpose of the subchapter is to implement the federal regulations, 20 C.F.R. Part 603, and state law, Texas Labor Code, Chapter 301, Subchapter F, regarding the confidentiality, custody, use, preservation, and disclosure of unemployment compensation information.

Section 815.161(b) explains that this subchapter is limited to the confidentiality requirements in federal and state laws and regulations specifically regarding unemployment information. The section further states that additional limitations on the release, custody, use, preservation, and disclosure of information maintained in unemployment insurance records may be imposed by other laws and regulations.

Section 815.161(c) sets out that no right or obligation of the Agency, party to a claim, employer, or third party to invoke limitations or confidentiality requirements based on such separate laws or regulations is waived or limited by this subchapter. Additionally, this subchapter does not address any right or obligation a party to an unemployment compensation claim may have to redisclose unemployment insurance information regarding his or her own claim or unemployment insurance tax records obtained lawfully from the Agency.

§815.162. Definitions.

Section 815.162 sets forth the definitions for terms used throughout Subchapter E of Chapter 815.

Section 815.162(1) defines "confidential unemployment compensation information" as unemployment compensation information in the records of the Agency, which includes identifying information regarding any individual or past or present employer or employing unit, including any information that foreseeably could be combined with other publicly available information to reveal identifying information regarding the individual, employer, or employing unit.

Section 815.162(2) defines "informed consent release" as a written grant of authorization that meets the requirements of §815.166 of this subchapter made by an individual or employer to a third party to allow access to confidential unemployment compensation information. When a written release is impossible or impracticable to obtain, the third party may present such other form of consent as is permitted by the Agency.

Section 815.162(3) defines "party" as the employer or claimant to whom the confidential unemployment compensation information relates, including a base period employer that has appealed a notice of chargeback regarding a specific claim. This term does not include any past or present employer or claimant who is not the subject of the particular claim, except an employer that appealed a notice of chargeback relating to an employee in the chargeback period.

Section 815.162(4) defines "public official" as:

(A) an official, agency, or public entity within the executive branch of federal, state, or local government that has responsibility for administering or enforcing a law; or

(B) an elected official in the federal, state, or local government.

Section 815.162(5) defines "unemployment compensation information" as information in the records of the Agency that pertains to the administration of the Texas Unemployment Compensation Act, including any information collected, received, developed, or maintained in the administration of unemployment compensation benefits, the unemployment compensation tax system or the unemployment compensation benefit and tax appeal system.

§815.163. Disclosure of Confidential Unemployment Compensation Information

Section 815.163(a) states that the Agency shall not disclose confidential unemployment compensation information except in compliance with federal law, state law, and this subchapter, but notwithstanding any other provision of this chapter.

Section 815.163(b) explains that the Agency shall not disclose confidential unemployment compensation information if such disclosure interferes with the efficient administration of the state unemployment compensation law. In evaluating interference with efficient administration, the Agency may consider factors including, but not limited to, the burdensomeness of the request and whether the request places an employer's or individual's privacy at unacceptable risk.

§815.164. Mandatory and Permissive Disclosures

Section 815.164(a) clarifies that the Agency shall disclose confidential unemployment compensation information if disclosure is necessary for the proper administration of the unemployment compensation program.

Section 815.164(b) explains that disclosure necessary for the proper administration of the unemployment compensation program includes, but is not limited to, disclosure required under 20 C.F.R. §603.6, as well as disclosure to claimants, employers, and third parties, as necessary, for purposes of unemployment administration and adjudication processes under this chapter.

§815.165. Exceptions to Confidentiality Requirements

Section 815.165(a) allows the Agency to disclose public domain information. For purposes of this section, public domain information is defined to include directory information about the organization of the state, the Commission, and appellate authorities, as well as the names and positions of officials and employees; information about the state unemployment compensation law (and applicable federal law), provisions, rules, regulations, and interpretations, including statements of general policy and interpretations of general applicability; and any agreement relating to the administration of the state unemployment compensation law. Commission-designated precedent case digests from which all individually identifiable information has been removed also constitute public domain information. But public domain information does not include information historically excepted from disclosure under the Public Information Act, Chapter 552, Texas Government Code, including, but not limited to, attorney/client privileged information; interagency memoranda containing advice, opinion, or recommendation to policy makers or decision makers; or other items historically excepted from disclosure under the Public Information Act.

Section 815.165(b) states that the Agency may disclose confidential unemployment compensation information about an individual or employer to that individual or employer, respectively, but in no event does this restrict the Agency from withholding information historically excepted from disclosure including, but not limited to, confidential informant or attorney-client privileged information, or tax audit techniques.

Section 815.165(c) provides that the Agency may disclose confidential unemployment compensation information, so long as the requestor provides a written release demonstrating informed consent signed by the individual or the employer whose records are requested, and if the written release demonstrated informed consent.

Section 815.165(d)(1) - (5) states that the Agency may disclose confidential unemployment compensation information, based on informed consent, to the following:

(1) An agent who acts for or in the place of an individual or an employer by the authority of that individual or employer if the agent presents a written release signed by the party to be represented. If a written release is impossible or impracticable to obtain, the Agency may accept other documentation sufficient to establish informed consent.

(2) An elected official performing constituent services, so long as the official presents reasonable evidence of authorization to obtain the information, such as a letter from the individual or employer requesting the elected official's assistance or a written record of a telephone request from the individual or employer that the individual or employer has authorized such disclosure.

(3) A licensed attorney retained for purposes unrelated to the state's unemployment compensation law; if the attorney provides a written statement declaring that he or she has been retained to represent the individual or employer, the requirements of a written release are met. An attorney retained for purposes related to the state's unemployment compensation law may assert that he or she is representing the individual or employer, and such assertion need not be in writing.

(4) A third party that is not acting as an agent, but only if that entity provides the Agency with a copy of an informed consent release consistent with the requirements of §815.166 of this subchapter.

(5) A third party seeking confidential information on an ongoing basis, only if that entity submits an informed consent release consistent with the requirements of §815.166. This requirement applies even if the third party is an agent seeking information on an ongoing basis.

Section 815.165(e) provides that the Agency may disclose confidential unemployment compensation information to a public official for use in the performance of his or her official duties, including the administration or enforcement of law or execution of the official responsibilities of a federal, state, or local elected official. Administration of law includes research related to the law administered by the public official. Execution of official responsibilities does not include solicitation of contributions or expenditures to or on behalf of a candidate for public or political office or a political party.

Section 815.165(f) states that the Agency may disclose confidential unemployment compensation information to a public official's agent or contractor if such disclosure is permissible under 20 C.F.R. §603.5(e) and only after evaluating the following factors:

(1) the potential threat to the employer's or individual's privacy posed by an entity's collection, storage, maintenance, use, and possible misuse of confidential unemployment compensation information;

(2) the costs associated with such disclosure;

(3) the agent or contractor's ability to comply with the requirements in 20 C.F.R. §603.9 regarding safeguards and security of confidential unemployment compensation information;

(4) the costs of enforcement, including investigation and assessment of penalties for misuse of data;

(5) the costs to develop, monitor, and maintain systems sufficient to allow audit of the information;

(6) the personnel, travel, and equipment expenses associated with periodic monitoring and on-site audits required by 20 C.F.R. §603.10; and

(7) whether the disclosure is for purposes of solicitation of contributions or expenditures to or on behalf of a candidate for public or political office or a political party.

Section 815.165(g) explains that the Agency may disclose confidential unemployment compensation information to parties for purposes of claims adjudications, hearings and appeals, consistent with this chapter.

Section 815.165(h) provides that the Agency may disclose confidential unemployment compensation information to a federal official for purposes of UC program oversight and audits, including disclosures under 20 C.F.R. Parts 29 and 601, as well as under 20 C.F.R. Parts 96 and 97.

Section 815.165(i) clarifies that the confidentiality requirements of this chapter do not apply to information collected exclusively for statistical purposes under a cooperative agreement with the Bureau of Labor Statistics (BLS). Further, this chapter's requirements do not restrict or impose any condition on the transfer of any other information to BLS under an agreement, or the disclosure or use of such information by BLS.

§815.166. Informed Consent Release.

Section 815.166(1) - (5) allows the Agency to disclose confidential unemployment compensation information upon submission

of an informed consent release as set forth in this section. An informed consent release is a written release that must be signed by the individual or employer, and must specify the following:

(1) The information to be disclosed;

(2) That the information will be obtained through access of state government files;

(3) The purpose or purposes for which the information is sought;

(4) That the information obtained under the release will be used only for that purpose or purposes;

(5) The individuals or entities that may receive the information; and

(6) A purpose limited to assisting the individual with obtaining a service or benefit, or meeting a federal or state law requirement for the administration or evaluation of a public program to which the release pertains.

§815.167. Subpoenas and Court Orders.

Section 815.167(1) - (2) states that the Agency may disclose confidential unemployment compensation information in compliance with:

(1) a court order specifically requiring such disclosure; or

(2) a subpoena issued by a local, state, or federal official, other than a court clerk, provided the official possesses legal authority to obtain such information by subpoena under state or federal law.

§815.168. Charges for Disclosure of Unemployment Compensation Information.

Section 815.168(a) requires the Agency to recoup the cost of providing unemployment compensation information consistent with 20 C.F.R. §603.8. It allows the Agency to charge actual charges and to set standardized charges for items routinely requested.

Section 815.168(b) states that the Agency may only release unemployment compensation information for non-unemployment compensation purposes to the following individuals if the unemployment compensation program is reimbursed and there is a written, enforceable confidentiality agreement:

(1) third-party requestors;

(2) public officials; and

(3) contractors of public officials, provided the public officials remain liable for the actions of the contractor.

No comments were received.

SUBCHAPTER B. BENEFITS, CLAIMS AND APPEALS

40 TAC §815.18

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities. Further, these rules are adopted under Texas Labor Code §301.085(b), which requires that, consistent with federal law, the Commission shall adopt and enforce reasonable rules governing the confidentiality, custody, use, preservation, and disclosure of unemployment compensation information. The rules must include safeguards to protect the confidentiality of identifying information regarding any individual or any past or present employer or employing unit contained in unemployment compensation information, including any information that foreseeably could be combined with other publicly available information to reveal identifying information regarding the individual, employer, or employing unit, as applicable.

The adopted rules affect Texas Labor Code, Title IV.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 8, 2008.

TRD-200803500
Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery Branch
Texas Workforce Commission
Effective date: July 28, 2008
Proposal publication date: May 16, 2008
For further information, please call: (512) 475-0829

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SUBCHAPTER E. CONFIDENTIALITY AND DISCLOSURE OF STATE UNEMPLOYMENT COMPENSATION INFORMATION

40 TAC §§815.161 - 815.168

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities. Further, these rules are adopted under Texas Labor Code §301.085(b), which requires that, consistent with federal law, the Commission shall adopt and enforce reasonable rules governing the confidentiality, custody, use, preservation, and disclosure of unemployment compensation information. The rules must include safeguards to protect the confidentiality of identifying information regarding any individual or any past or present employer or employing unit contained in unemployment compensation information, including any information that foreseeably could be combined with other publicly available information to reveal identifying information regarding the individual, employer, or employing unit, as applicable.

The adopted rules affect Texas Labor Code, Title IV.

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TRD-200803501
Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery Branch
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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Adopted Rule Reviews

Texas Department of Agriculture

Title 4, Part 1

The Texas Department of Agriculture (the department) adopts the review of Title 4, Texas Administrative Code, Part 1, Chapter 3, Subchapters A - J, concerning Boll Weevil Eradication Program, pursuant to the Texas Government Code, §2001.039, and readopts all sections in Chapter 3, Subchapters A - J, with amendments proposed to the chapter in the department's notice of intent to review. The notice of intent to review was published in the May 30, 2008, issue of the *Texas Register* (33 TexReg 4347). No comments were received on the proposal.

Section 2001.039 requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the original justification for the rules continues to exist. As part of the review process, the department proposed amendments to Chapter 3, Subchapter B, §3.20, relating to Statement of Purpose and Role of the Department, and the repeal of §3.21, relating to Rule Consistency and Approval. The proposed amendments and repeal were also published in the May 30, 2008, issue of the *Texas Register* (33 TexReg 4282). No comments were received on the proposal.

The assessment of Title 4, Texas Administrative Code, Part 1, Chapter 3, Subchapters A - J, by the department at this time, indicates that, with the addition of the adopted amendments to §3.20 and the repeal of §3.21, the reason for readopting without changes all sections in Chapter 3, Subchapters A - J, continues to exist.

TRD-200803534
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: July 10, 2008

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Texas State Board of Plumbing Examiners

Title 22, Part 17

The Texas State Board of Plumbing Examiners (Board) re-adopts Title 22, Part 17, Chapter 365, concerning Licensing and Registration, without any changes. The proposed rule review was published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3653).

No comments were received regarding the rule review.

The Board has determined that the reasons for initially adopting these rules continue to exist.

The review and re-adoption of Chapter 365 is done pursuant to Texas Government Code, §2001.039, which requires agencies to periodically review rules. The re-adoption is also authorized under and affect Title 8, Chapter 1301, Occupations Code ("Plumbing License Law"), §1301.251, which requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law.

This concludes the review of Title 22, Part 17, Chapter 365, concerning Licensing and Registration.

TRD-200803610
Robert L. Maxwell
Executive Director
Texas State Board of Plumbing Examiners
Filed: July 15, 2008

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The Texas State Board of Plumbing Examiners (Board) re-adopts Title 22, Part 17, Chapter 367, concerning Enforcement, without any changes. The proposed rule review was published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3653).

No comments were received regarding the rule review.

The Board has determined that the reasons for initially adopting these rules continue to exist.

The review and re-adoption of Chapter 367 is done pursuant to Texas Government Code, §2001.039, which requires agencies to periodically review rules. The re-adoption is also authorized under and affect Title 8, Chapter 1301, Occupations Code ("Plumbing License Law"), §1301.251, which requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law.

This concludes the review of Title 22, Part 17, Chapter 367, concerning Enforcement.

TRD-200803612
Robert L. Maxwell
Executive Director
Texas State Board of Plumbing Examiners
Filed: July 15, 2008

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 4 TAC §19.602(b)

Scientific Name	Common Name(s)
Acoelorraphe wrightii	Everglades palm
Adonidia merrilli (= Veitchia)	Manila palm, Christmas palm
Aiphanes spp.	Multiple crown palm, Ruffle palm
Areca catechu	Betel nut palm
Areca spp.	
Bactris plumeriana	Coco macaco, Prickly pole
Bismarckia nobilis	Bismarck palm
Caryota mitis	Fishtail palm
Chamaedorea spp.	Chamaedorea palm
Cocos nucifera	Coconut palm
Dictyosperma album	Princess palm, Hurricane palm
Dypsis decaryi	Triangle palm
Dypsis lutescens (= Chrysalidocarpus)	Areca palm, Golden cane palm, Butterfly palm
Elaeis guineensis	African oil palm
Licuala grandis	Licuala palm, Ruffled fan palm
Livistona chinensis	Chinese fan palm
Phoenix canariensis	Canary Island date palm
Phoenix dactylifera	Date palm
Phoenix reclinata	Senegal date palm
Phoenix roebelenii	Pygmy date palm, Roebelenii palm
Pritchardia pacifica	Fiji fan palm
Pseudophoenix sargentii	Buccaneer palm
Pseudophoenix vinifera	Cacheo, Katié
Ptychosperma elegans	Solitaire palm, Alexander palm
Ptychosperma macarthurii	Macarthur palm
Rhapis excelsa	Lady palm, Bamboo palm
Roystonea borinquena	Royal palm
Syagrus romanzoffiana	Queen palm
Syagrus schizophylla	Arikury palm
Washingtonia filifera	Fan palm
Washingtonia robusta	Mexican fan palm
Wodyetis bifurcata	Foxtail palm
Heliconia bihai	Macaw flower
Heliconia caribaea	Wild plantain, Balisier
Heliconia psittacorum	Parrot flower
Heliconia rostrata	Lobster claw Heliconia
Musa acuminate	Edible banana, Plantain
Musa balbisiana	Wild banana
Musa uranoscopus	Red-flowering banana
Musa x paradisiacal (= Musa sapientum)	Edible banana, Plantain
Musa corniculata	Red banana

Musa spp.	Banana, Plantain
Pandanus utilis	Screw pine
Strelitzia reginae	Bird of paradise, Crane flower
Ravenala madagascariensis	Traveler's tree
Etlingera elatior (= Nicolaia)	Red torch ginger
Alpinia purpurata	Red ginger, Jungle king/queen
Alpinia zerumbet (Pers.)	Shell ginger; Pink porcelain lily; Shell plant

Figure: 4 TAC §20.22(a)

Pest Mgmt Zone	Earliest Planting Date	Destruction Deadline	End Date for Destruction Requirements
1	February 1	September 1	March 1
2 - Area 1	February 1	September 1	March 1
2 - Area 2	February 1	September 1	March 1
2 - Area 3	February 1	September 15 [1]	March 1
2 - Area 4	February 1	October 1	March 1
3 - Area 1	February 1	October 1	Emergence of new crop
3 - Area 2	February 1	October 15	Emergence of new crop
3 – Area 3	February 1	October 20	Emergence of new crop
4	February 1	October 10	Emergence of new crop
6	February 1	October 31	Emergence of new crop
7 - Area 1	February 1	November 30	Emergence of new crop
7 – Area 2	February 1	October 31	Emergence of new crop
8 - Area 1	February 1	October 31	Emergence of new crop
8 - Area 2	February 1	November 30	Emergence of new crop
9	April 1	March 1	May 1
10	March 25	February 1	March 25

Figure: 28 TAC §5.6408(c)

BOND OF [~~ADMINISTRATOR OR~~] SERVICE COMPANY FOR A WORKERS' COMPENSATION SELF-INSURED GROUP

Know all persons by these presents, that (name of [~~administrator or~~] service company), as principal, and (name of surety), as surety, being a surety company duly authorized to do business in the State of Texas, are held and firmly bound unto the (name of group or in the event of a receivership, the receiver) [~~Texas Department of Insurance~~] for the obligations and liabilities of the principal, arising from or related to providing claims services, in the sum of $_____, lawful money of the United States, for the payment of which sum we bind ourselves, our successors and assigns, jointly and severally.

The conditions of the above obligations are:

Whereas, the above named principal has entered into an agreement dated _____ with (name of [~~self-insurance~~] group) to perform duties and services for the group.

Now, therefore, if the principal shall perform its [~~his/her~~] duties and obligations under the agreement dated _____, then this obligation shall be void; otherwise, this obligation will remain in full force and effect.

PROVIDED, this bond may be canceled as a future liability by the surety upon sixty days written notice to the principal and the (name of group or in the event of a receivership, the receiver) [~~Commissioner of the Texas Department of Insurance~~]; however, such cancellation shall not discharge the surety's liability accrued during the term of this bond or which shall accrue in said sixty day period.

In witness whereof said principal and surety have executed this bond the _____ day of _____, 20__, to be effective the ___day of _____, 20__.

_____
Principal

_____
Surety

Form Number FIN 464

Figure: 30 TAC §299.1(a)(2)

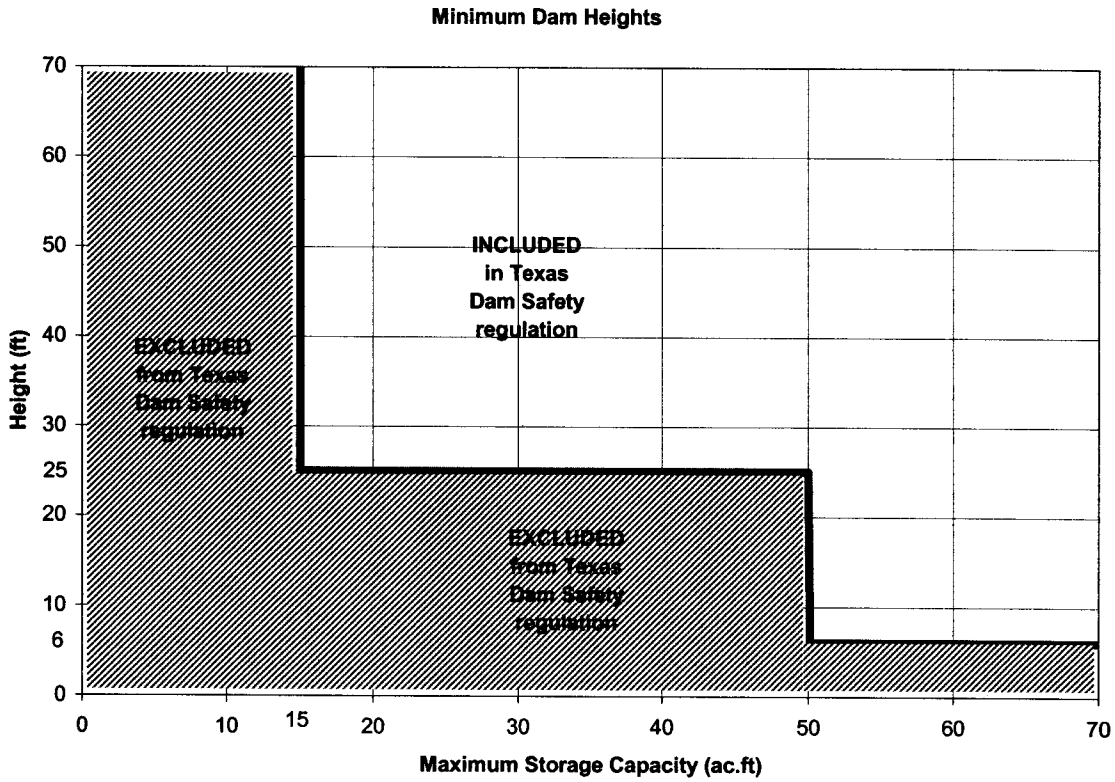

Figure: 30 TAC §299.13

Size Classification

Category	Impoundment Maximum Storage (Acre-Foot)	Height (Ft.)
Small	Equal to or Greater than 15 and Less than 1,000 Equal to or Greater than 50 and Less than 1,000	Equal to or Greater than 25 and Less than 40 Equal to or Greater than 6 and Less than 40
Intermediate	Equal to or Greater than 1,000 and Less than 50,000	Equal to or Greater than 40 and Less than 100
Large	Equal to or Greater than 50,000	Equal to or Greater than 100

Figure: 30 TAC §299.15(a)(1)(A)

Hydrologic Criteria for Dams

Classification		
Hazard, as defined in §299.14 of this title (relating to Hazard Classification Criteria)	Size, as defined in §299.13 of this title (relating to Size Classification Criteria)	Minimum Design Flood Hydrograph (expressed as a percentage of the probable maximum flood (PMF)).
Low	Small	25% PMF
	Intermediate	25% PMF to 50% PMF
	Large	50% to 75% PMF
Significant	Small	50% PMF
	Intermediate	50% PMF to 75% PMF
	Large	75% to PMF
High	Small	75% PMF
	Intermediate	75% to PMF
	Large	PMF
When a range is given, the minimum flood hydrograph must be determined by straight-line interpolation within the given range. Interpolation must be based on either height of dam or maximum storage capacity, whichever results in the highest percentage of PMF. The interpolation for large, low-hazard dams for height must be between end points of 100 feet and 50% PMF and 200 feet and 75% PMF. The interpolation for large, low-hazard dams for maximum storage capacity must be between the end points of 50,000 acre-feet and 50% PMF and 300,000 acre-feet and 75% PMF. The interpolation for large, significant-hazard dams for height must be between end points of 100 feet and 75% PMF and 200 feet and PMF. The interpolation for large, significant-hazard for maximum storage capacity must be between the end points of 50,000 acre-feet and 75% PMF and 300,000 acre-feet and PMF.		

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of July 4, 2008, through July 10, 2008. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for this activity extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on July 16, 2008. The public comment period for this project will close at 5:00 p.m. on August 15, 2008.

FEDERAL AGENCY ACTIONS:

Applicant: David Eller; Location: The project is located in Hynes Bay, also referred to as San Antonio Bay, at Swan Point Landing, in Seadrift, Calhoun County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Seadrift, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 724610; Northing: 3142601. Project Description: The applicant proposes to amend Permit 22723 to add a condominium building, retail storefront, and to dredge a new harbor with waterfront residential home lots. Permit 22723 authorized the construction of two boat storage buildings in an inlet adjacent to Hynes Bay. The proposed harbor would be dredged to a depth of -5.65 feet below mean high water at the most inland point and -5.94 feet below mean high water at the entrance to the existing harbor. Depth in the existing harbor is -5.94 feet below mean high water. Depth in Hynes Bay, at the mouth of the existing harbor, ranges from -2 feet below mean high water to -5.44 feet below mean high water. CCC Project No.: 08-0186-F1. Type of Application: U.S.A.C.E. permit application #SWG-2007-01554 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451 - 1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the application listed above, including a copy the consistency certifications for inspection, may be obtained from Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200803594
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: July 14, 2008

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Comptroller of Public Accounts

Notice of Intent to Amend Contract

Pursuant to Chapters 403 and Chapter 2254, Subchapter B, Texas Government Code, the Comptroller of Public Accounts (Comptroller), on behalf of the Texas Prepaid Higher Education Tuition Board (Board), announces the following notice of intent to increase and extend a major consulting services contract with AKF Consulting LLC as follows:

The contract with AKF Consulting LLC will be amended and increased from not-to-exceed $50,000.00 to not-to-exceed $75,000.00. The original term of the contract, from November 27, 2007 through December 31, 2008, is also extended to December 31, 2009. There is one (1) option to renew for one (1) additional one (1) year term.

The notice of request for proposals was published in the October 19, 2007, issue of the *Texas Register* (32 TexReg 7539), RFP #181a.

The contractor will provide consulting and technical advice and assistance to the Comptroller and the Texas Prepaid Higher Education Tuition Board in the evaluation, selection, and ongoing administration of the new Texas Tuition Promise Fund (formerly known as the Texas Tomorrow Fund II).

TRD-200803625
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: July 16, 2008

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Notice of Withdrawal of Request for Proposals

Pursuant to Chapter 2254, Subchapter B, Texas Government Code, and Chapter 404, Texas Government Code, the Comptroller of Public Accounts (Comptroller), on behalf of the Texas Treasury Safekeeping Trust Company (Trust Company), announces the withdrawal of its Request for Proposals (RFP 188a) for investment consulting services for the Trust Company.

Issuance Date: The Request for Proposals was published in the July 11, 2008, issue of the *Texas Register* (33 TexReg 5570).

TRD-200803622
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: July 16, 2008

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 07/21/08 - 07/27/08 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 07/21/08 - 07/27/08 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200803597
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: July 15, 2008

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Credit Union Department

Application to Expand Field of Membership

Notice is given that the following application has been filed with the Credit Union Department and is under consideration:

An application was received from PosTel Family Credit Union, Wichita Falls, Texas to expand its field of membership. The proposal would permit employees of Media Recovery Inc. (MRI) who work in or are paid out of the Graham, Texas, to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236 or downloading the form at http://www.tcud.state.tx.us/applications.html. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200803629
Harold E. Feeney
Commissioner
Credit Union Department
Filed: July 16, 2008

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Notice of Final Action Taken

In accordance with the provisions of 7 TAC §91.103, the Credit Union Department provides notice of the final action taken on the following application(s):

Application(s) to Expand Field of Membership - Approved

Members Choice Credit Union, Houston, Texas - See *Texas Register* issue dated December 28, 2007.

TexasOne Community Credit Union, Houston, Texas - See *Texas Register* issue dated February 29, 2008.

United Credit Union, Tyler, Texas - See *Texas Register* issue dated April 25, 2008.

First United Credit Union, Tyler, Texas - See *Texas Register* issue dated April 25, 2008.

MembersSource Credit Union, Houston, Texas - See *Texas Register* issue dated May 30, 2008.

Application(s) to Amend Articles of Incorporation - Approved

U. S. Employees Credit Union, The Woodlands, Texas - See *Texas Register* issue dated May 30, 2008.

Application(s) for a Merger or Consolidation - Approved

Permian Basin Credit Union (Odessa) and Midland Community Federal Credit Union (Midland) - See *Texas Register* issue dated November 30, 2007.

Application(s) for a Merger or Consolidation - Withdrawn

Houston Highway Credit Union (Houston) and Energy Capital Credit Union (Houston) - See *Texas Register* issue dated March 28, 2008.

TRD-200803630
Harold E. Feeney
Commissioner
Credit Union Department
Filed: July 16, 2008

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Texas Education Agency

Request for Applications Concerning the Collaborative Dropout Reduction Pilot Program, Cycle 2

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-08-133 from eligible public school districts and open-enrollment charter schools in Texas. Districts are eligible if 70 percent or more of students enrolled in the district have been identified as being economically disadvantaged or if the district's annual dropout rate for Grades 7-12 is in the top ten percent of its comparable size category. A list of eligible districts will be posted to the TEA Grant Opportunities page at http://burleson.tea.state.tx.us/GrantOpportunities/forms. Eligible districts may form a shared services arrangement (SSA) in order to qualify for grant funds. An SSA is limited to no more than ten eligible districts. Education service centers (ESCs) are not eligible to apply as fiscal agents for an SSA under this grant.

Description. The purpose of this application is to solicit grant applications from eligible applicants to implement a pilot program to comprehensively reduce the number of students who drop out of school, increase student job skills and employment opportunities, and provide continuing education opportunities for students who might otherwise have dropped out of school. The local collaborative dropout reduction program is designed to provide a variety of services and interventions for students in the following four required service areas: workforce skill development, academic support, attendance improvement, and student and family support services.

The pilot program serves students in Grades 9-12, and at least 50 percent of the students served in the program must be identified as being at risk of dropping out of school as defined in the Texas Education Code, §29.081(d).

Programs must collaborate with one or more local businesses, other local governments or law-enforcement agencies, nonprofit organizations, faith-based organizations, or institutions of higher education to deliver proven, research-based intervention strategies and services.

Dates of Project. The Collaborative Dropout Reduction Pilot Program, Cycle 2, will be implemented during the 2008-2009, 2009-2010, and 2010-2011 school years. Applicants should plan for a starting date of no earlier than January 1, 2009, and an ending date of no later than February 28, 2011.

Project Amount. A total of approximately $4 million is available for funding approximately 16 to 20 projects. Each project will receive a maximum of $250,000 for the 2008-2011 grant period. This project is funded 100 percent from state funds. Awarded districts will receive a base of $50,000 to create a new program or to expand/enhance current dropout programs in accordance with the provisions of the authorizing statute, and up to $1,000 per student served by the pilot program. Districts must hire or appoint a project coordinator and may use a reasonable and appropriate amount of grant and/or local funds for that purpose. Districts or SSAs must serve a minimum of 20 students.

Each individual collaborative partner is not required to provide matching funds. However, applicants must demonstrate total matching funds and/or in-kind contributions from collaborating partners of at least 10 percent of the grant amount requested.

Selection Criteria. Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. Due to the high cost of printing and mailing RFAs, they will no longer be available in print. The announcement letter and complete RFA will be posted on the TEA website at http://burleson.tea.state.tx.us/GrantOpportunities/forms for viewing and downloading. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Applicant's Conference. An applicant's conference will be held on Tuesday, August 19, 2008, from 1:00 p.m. until 3:00 p.m. via the Texas Educational Telecommunication Network (TETN) available at each regional ESC (TETN Event #31655). To locate the nearest TETN facility, applicants should contact the TETN site manager at their regional ESC. A complete list of ESCs, including contact information, is available on the TEA website at http://www.tea.state.tx.us/ESC/. Questions relevant to the RFA may be sent to Chris Caesar at chris.caesar@tea.state.tx.us or faxed to (512) 463-4246 prior to August 19, 2008. These questions, along with other information, will be addressed in the presentation. The conference will be open to all potential applicants and will provide general and clarifying information about the program and RFA.

The entire applicant's conference will be digitally recorded and streamed over the Internet. Prospective applicants who are not able to attend the applicant's conference may request a password and procedures to download the video stream from the TETN site manager at their local ESC.

Further Information. For clarifying information about the RFA, contact Chris Caesar, Division of State Initiatives, Texas Education Agency, (512) 936-6434. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any information that is different from or in addition to information provided in the RFA will be provided only in response to written inquiries. Copies of all such inquiries and the written answers thereto will be posted on the TEA website in the format of Frequently Asked Questions (FAQs) at http://burleson.tea.state.tx.us/GrantOpportunities/forms. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Deadline for Receipt of Applications. Applications must be received in the TEA Document Control Center by 5:00 p.m. (Central Time), Thursday, September 25, 2008, to be eligible to be considered for funding.

TRD-200803628
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: July 16, 2008

Request for eGrants Applications Concerning Investment Capital Fund Grant Program, Cycle 18, School Years 2008-2009 and 2009-2010

Eligible Applicants. The Texas Education Agency (TEA) is requesting eGrants applications under Request for Applications (RFA) #701-08-113 from school districts and open-enrollment charter schools on behalf of an individual campus. A multi-campus school district or open-enrollment charter school may submit more than one application; however, each application must address strategies and activities for a single campus and its community. The school must have demonstrated a commitment to campus deregulation and to restructuring educational practices and conditions at the school by entering into a partnership with school staff; parents of students at the school; community and business leaders; school district officers; and a nonprofit community-based organization that has a demonstrated capacity to train, develop, and organize parents and community leaders into a large, nonpartisan constituency that will hold the school and the school district accountable for achieving high academic standards. Campuses currently participating in the 2007 - 2008 Investment Capital Fund Grant Program, Cycle 17 (SAS #ICFGAA08) are not eligible to participate in this project.

Description. The purposes of the Investment Capital Fund are to (1) assist eligible public schools to implement practices and procedures consistent with deregulation and school restructuring so as to improve student achievement, and (2) help schools identify and train parents and community leaders who will hold the school and the school district accountable for achieving high academic standards. The primary objective of the Investment Capital Fund grant program is to improve academic performance through the following program goals: train school staff, parents, and community leaders to understand academic standards; develop and implement effective strategies to improve student performance; organize a large constituency of parents and community leaders who will hold the school and school district accountable for achieving high academic standards; and engage in ongoing planning to help ensure the success of the grant program.

Dates of Project. The Investment Capital Fund Grant, Cycle 18, will be implemented during the 2008 - 2009 and 2009 - 2010 school years. Applicants should plan for a starting date of no earlier than March 1, 2009, and an ending date of no later than August 31, 2010.

Project Amount. Funding will be provided for approximately 90 projects. Each project will receive a maximum of $50,000 for the grant period.

Selection Criteria. Applications will be selected based on the independent reviewers' assessment of each applicant's ability to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. The TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA and that are most advantageous to the project.

The TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Obtaining Access to the eGrants Application. This grant is available only through eGrants and may not be submitted through any other means. A Texas Education Agency Secure Environment (TEA SE) username and password are required for each user of eGrants. To request a TEA SE username and password, or for information on how to apply for eGrants access once a TEA SE account has been established, go to http://www.tea.state.tx.us/opge/egrant/index.html. Requestors will receive a username and password via email within approximately two weeks.

Grant Writer's Assignment Form. As part of the TEA eGrants system, the Grant Writer's Assignment Form has been introduced as a mechanism for identifying users who will have access to view and complete the Investment Capital Fund, Cycle 18, Grant Application. Due to the competitive nature of some grants, certain users will be designated to have access to a grant application by the superintendent or the organization's authorized official. Only the superintendent or the organization's authorized official may complete the form, and he or she must denote agreement with the authorization statement on the bottom of the form before the schedule is complete. The information submitted on the form is considered to be binding, and only the users identified on the form will have access to the grant application. The organization must select the eligible campuses so that the designated individuals will have access to the grant application.

The Grant Writer's Assignment Form will be available 30 days prior to publication of the grant in eGrants and must be submitted in order to gain access to the Investment Capital Fund, Cycle 18, Grant Application. The form will close 5 to 10 days before the deadline for receipt of applications, and access to the application will no longer be available if the form has not been completed and submitted.

Superintendents or organizations' authorized officials and eGrants TEA SE users can view the instructions for the Grant Writer's Assignment Form at http://maverick.tea.state.tx.us:8080/Guidelines/Template%20Forms/TEMPAA05PP2220_I.pdf.

To access the information and requirements for this grant, enter the TEA Grant Opportunities webpage at http://burleson.tea.state.tx.us/GrantOpportunities/forms. In the "Select Search Options" box, select the name of the program/RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Deadline for Receipt of eGrants Applications. The eGrants application will be available on or about Friday, August 15, 2008. The eGrants application must be certified and submitted by the official authorized to enter the applicant organization into a legally binding contractual agreement by 5:00 p.m. (Central Time), Thursday, September 25, 2008, to be considered for funding.

Further Information. For clarifying information about this notice or the RFA, contact Carlos Garza, Division of Discretionary Grants, Texas Education Agency, (512) 463-9269. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any information that is different from or in addition to information provided in the RFA will be provided only in response to written inquiries. Copies of all such inquiries and the written answers thereto will be posted on the TEA website in the format of Frequently Asked Questions (FAQ) at http://burleson.tea.state.tx.us/GrantOpportunities/forms.

TRD-200803627
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: July 16, 2008

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 25, 2008**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 25, 2008**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: Aero Greensmor, LP; DOCKET NUMBER: 2008-0661-MWD-E; IDENTIFIER: RN102093796; LOCATION:

Houston, Harris County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 Texas Administrative Code (TAC) §305.65 and §305.125(2) and the Code, §26.121(a)(1), by failing to maintain a Texas Pollutant Discharge Elimination System permit; PENALTY: $5,100; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Air Liquide Large Industries U.S. LP; DOCKET NUMBER: 2008-0663-AIR-E; IDENTIFIER: RN100233998; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 73110, Special Condition (SC) Number 1, and Texas Health and Safety Code (THSC), §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $3,950; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Apache Disposal, Inc.; DOCKET NUMBER: 2008-0272-MLM-E; IDENTIFIER: RN105225098; LOCATION: Marion, Guadalupe County; TYPE OF FACILITY: commercial trash hauling service; RULE VIOLATED: 30 TAC §334.75(a)(1) and §334.129(a), by failing to immediately clean up and report a release of diesel fuel from the aboveground storage tanks (ASTs) and comply with release investigation and corrective action requirements; 30 TAC §330.7(a), by failing to obtain authorization for the storage and processing of municipal solid waste (MSW); and 30 TAC §334.127(a), by failing to register ASTs containing a petroleum product; PENALTY: $5,200; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(4) COMPANY: City of Bardwell; DOCKET NUMBER: 2008-0777-PWS-E; IDENTIFIER: RN101238608; LOCATION: Bardwell, Ellis County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(q)(1), by failing to issue a boil water notification; PENALTY: $250; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeoduru, (512) 239-1482; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: Fayette County Water Control and Improvement District Monument Hill; DOCKET NUMBER: 2008-0489-PWS-E; IDENTIFIER: RN101389054; LOCATION: Fayette County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and THSC, §341.0315(c), by failing to comply with the maximum contaminant level for total trihalomethanes; PENALTY: $347; ENFORCEMENT COORDINATOR: Amanda Henry, (713) 767-3500; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(6) COMPANY: JIMI Enterprise Inc; DOCKET NUMBER: 2008-0833-MSW-E; IDENTIFIER: RN105291314; LOCATION: Eddy, McLennan County; TYPE OF FACILITY: tire storage; RULE VIOLATED: 30 TAC §328.56(d)(4), by failing to have an effective vector control program on site; PENALTY: $475; ENFORCEMENT COORDINATOR: Ross Fife, (512) 239-2541; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 77710-7826, (254) 751-0335.

(7) COMPANY: Joel Bazan dba Bazan Scrap Tire Facility; DOCKET NUMBER: 2008-0300-MLM-E; IDENTIFIER: RN102983301; LOCATION: Duval County; TYPE OF FACILITY: unauthorized tire storage; RULE VIOLATED: 30 TAC §328.56(d)(2) and §328.60(a) and THSC, §361.112(a), by failing to obtain a scrap tire storage registration for storing more than 500 scrap or used tires; 30 TAC §328.57(c)(3) and THSC, §361.112(c), by failing to transport used tires to an authorized site; 30 TAC §111.201 and THSC, §382.085(b), by failing to comply with the general prohibition on outdoor burning; and 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of MSW; PENALTY: $10,054; ENFORCEMENT COORDINATOR: Colin Barth, (512) 239-0086; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(8) COMPANY: McWane, Inc.; DOCKET NUMBER: 2008-0192-AIR-E; IDENTIFIER: RN102679867; LOCATION: Tyler, Smith County; TYPE OF FACILITY: iron and steel foundry; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Numbers 9425 and PSD-TX-1066, SC Number 1, Federal Operating Permit O-01407, SC Number 7, and THSC, §382.085(b), by failing to adhere to the permitted maximum allowable emission rate table limit; PENALTY: $12,950; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(9) COMPANY: PAC-N-SAC STORES, INC. dba Pac N Sac 104; DOCKET NUMBER: 2008-0731-MLM-E; IDENTIFIER: RN101499515; LOCATION: San Marcos, Hays County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor underground storage tanks (USTs) for releases; 30 TAC §334.49(c)(2)(C) and the Code, §26.3475(d), by failing to inspect the impressed current cathodic protection system; 30 TAC §334.49(c)(4) and the Code, §26.3475(d), by failing to inspect and test the cathodic protection system for operability and adequacy of protection; and 30 TAC §213.5(d)(1), by failing to provide a functioning continuous monitoring leak detection system; PENALTY: $8,701; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(10) COMPANY: Khaveed Ali dba Speedy Food Market; DOCKET NUMBER: 2008-0508-PST-E; IDENTIFIER: RN101900637; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor USTs for releases; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records; and 30 TAC §334.49(c)(4) and the Code, §26.3475(d), by failing to have the cathodic protection system inspected and tested for operability and adequacy of protection; PENALTY: $8,856; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-200803596
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 15, 2008

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Notice of Issuance of a New Air Quality Standard Permit for Permanent Rock and Concrete Crushers and Amendments to the Existing Air Quality Standard Permit for Temporary Rock and Concrete Crushers

The Texas Commission on Environmental Quality (TCEQ) is issuing both a new Air Quality Standard Permit for Permanent Rock and Concrete Crushers and amendments to the Air Quality Standard Permit for Temporary Rock and Concrete Crushers under the Texas Clean Air Act (TCAA), Texas Health and Safety Code (THSC), §382.05195, Standard Permit, and Title 30 Texas Administrative Code (TAC) Chapter

116, Subchapter F, Standard Permits. Both the new standard permit and the amendments will be effective July 31, 2008.

Copies of the Air Quality Standard Permit for Permanent Rock and Concrete Crushers may be obtained from the TCEQ web site at *http://www.tceq.state.tx.us/assets/public/permitting/air/NewSourceReview/Mechanical/rc_sp.pdf*. Copies of the amendments to the Air Quality Standard Permit for Temporary Rock and Concrete Crushers may be obtained from the TCEQ web site at *http://www.tceq.state.tx.us/assets/public/permitting/air/NewSourceReview/Mechanical/tr_cc_sp.pdf*, or by contacting the Texas Commission on Environmental Quality, Office of Permitting, Remediation, and Registration, Air Permits Division, at (512) 239-1250.

OVERVIEW OF THE STANDARD PERMIT AND AMENDMENTS

The standard permit for permanent rock and concrete crushers is applicable to all rock crushers that process nonmetallic minerals or a combination of nonmetallic minerals at quarries, mines, aggregate handling facilities, concrete recycling sites, etc., on a permanent basis and meet the conditions of the standard permit. This standard permit is replacing the current permit by rule (PBR) for rock crushers previously available under 30 TAC §106.142, Rock Crushers. This standard permit updates technical requirements, provides clearer, more enforceable conditions, requires recordkeeping that facilitates the determination of compliance, and updates the authorization for these facilities to include statutory requirements for certain concrete crushers. In a separate commission action, 30 TAC §106.142 has been repealed and will be unavailable for use for new or modified crushing facilities upon issuance of this standard permit. In accordance with 30 TAC §116.13, owners or operators of crushing facilities authorized by the PBR may continue to operate under the PBR unless the crusher is moved or modified.

The existing Air Quality Standard Permit for Temporary Rock and Concrete Crushers has been amended to improve readability, flexibility, and enforceability. Requirements concerning emission limits, control requirements, and recordkeeping have not changed substantively.

The New Source Review Program under 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, requires any person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants into the air of the state to obtain a permit in accordance with 30 TAC §116.111, General Application, satisfy the *de minimis* criteria of 30 TAC §116.119, De Minimis Facilities or Sources, or satisfy the conditions of a standard permit, a flexible permit, or a PBR before any actual work is begun on the facility. A standard permit authorizes the construction of new facilities or modification of existing facilities that are similar in terms of operations, processes, and emissions.

PUBLIC NOTICE AND COMMENT PERIOD

In accordance with 30 TAC §116.603, Public Participation in Issuance of Standard Permits, and §116.605, Standard Permit Amendment and Revocation, the TCEQ published notice of these standard permits in the *Texas Register* and newspapers of the largest general circulation in Austin, Dallas, and Houston. The date for these publications was February 15, 2008. The public comment period was from the date of publication until March 21, 2008. Written comments were received by Hill Country Environmental, Inc. (HCE); CSA Materials, Inc. (CSA); Fred M. Bosse representing Southern Crushed Concrete, LLC (SCC); Associated General Contractors (AGC); Harris County Public Health & Environmental Resources (HCPHES); Westward Environmental, Inc. (WE); City of Houston Department of Health and Human Services, Bureau of Air Quality Control (BAQC); Jobe Materials, L.P. (Jobe); and the Texas Aggregate and Concrete Association (TACA).

PUBLIC MEETING

A public meeting on the proposed new standard permit and the amended standard permit was held on March 18, 2008, at 1:30 p.m., at the TCEQ, Building E, Room 254S, 12100 Park 35 Circle, Austin, Texas. Oral comments were provided by AGC and Jobe.

ANALYSIS OF COMMENTS

Comments on the Air Quality Standard Permit for Permanent Rock and Concrete Crushers

HCE commented that the definition of associated sources in condition (1)(A)(ii) includes activities that are not facilities as defined by the TCAA and 30 TAC Chapter 116 and are thus, not required to be authorized.

Associated sources, while not requiring authorization, may be regulated by permit conditions when co-located with an authorized facility in order to ensure that cumulative emissions from the associated sources and the facility do not result in adverse off-property impacts.

HCE requested the term dwelling be defined to include the conditions listed in the technical summary document that will be used to determine whether a structure is a dwelling.

The list of factors that may be used in determining whether a structure is a residence included in the technical summary document is meant to illustrate the types of considerations the executive director might use in making such a determination. The ultimate determination of whether a structure constitutes a dwelling will be made on a case-by-case basis considering above noted factors and the information specific to the particular structure and circumstances.

HCE commented that conditions (1)(E) and (1)(F) of the standard permit were too restrictive and requested that staff include language that would allow an owner or operator to continue to produce aggregate during a contested case hearing and retain the option to continue authorization under the standard permit if a new source review (NSR) permit application was denied or strongly opposed. Jobe also commented that condition (1)(E) was excessively restrictive.

As noted in the Permit Condition Analysis and Justification section of this document, conditions (1)(E) and (1)(F) were established to prevent the use of this standard permit as an immediate precursor to a larger crushing operation and to prevent an applicant that has contested case hearing requests for a permit under THSC, §382.0518, from withdrawing that application and immediately using this standard permit.

HCE commented that there is a typo in condition (3)(E).

The commission appreciates the comment and has corrected the error.

HCE requested the inclusion of additional language authorizing the removal of overburden.

With regard to the removal of overburden, unless the overburden material is processed by equipment meeting the definition of a facility, this activity does not require authorization. Additional and separate authorization is required if the owner or operator intends to process overburden material with a facility.

CSA commented that the combination of hours of operation and throughput limitations resulted in operating inefficiencies and suggested that higher production rates, more crushers, and more screens should be allowed.

The commission disagrees with this comment. This standard permit is being proposed to replace the current PBR for rock crushers and the intent is to provide authorization for a similar type and size operation. This standard permit is not meant to provide authorization for all unit configurations or operating scenarios for rock crushers. For facilities

that cannot meet the conditions of this standard permit, applicants may seek authorization by a case-by-case NSR permit.

SCC commented that modeling does not support the stockpile height limitation in condition (3)(O) and that this restriction should be removed.

The commission does not agree with this comment. A 45-foot stockpile height was the design criteria that was evaluated in the protectiveness review and the review indicated that there would be no adverse off-property impacts. The conditions in PBRs and standard permits are often more restrictive than those in a case-by-case NSR permit. This standard permit is not meant to provide authorization for all unit configurations or operating scenarios for rock crushers. Facilities that cannot meet the conditions of this standard permit may be authorized by a case-by-case NSR permit.

BAQC commented that city of Houston personnel have repeatedly observed that few of the crushing operations consistently practice the full set of regulatory requirements necessary to reduce air emissions under the TCEQ permits program. This can result in nuisance conditions beyond the 440-yard setback requirement and BAQC requested that the setback be increased to 1,500 feet.

The commission disagrees with this comment. If a facility complies with all conditions of this standard permit, then the 440-yard setback required by condition (1)(B) is adequate to prevent nuisance and is the distance specified by THSC, §382.065. It is expected that owners or operators of facilities authorized under this standard permit comply with all of the conditions of the permit or be subject to potential enforcement action.

BAQC and HCPHES requested that watering and road cleaning logs be included in the recordkeeping required by the permit. HCPHES also requested the inclusion of stockpile dust suppression activities and abatement systems maintenance in the recordkeeping requirements.

The commission agrees with the request to keep records of watering, road cleaning logs, and dust suppression activities at stockpiles. This standard permit gives considerable latitude to owners and operators regarding the frequency of these tasks due to the influence of weather conditions on the potential for emissions. It is reasonable to expect the owner or operator to supply evidence that these tasks are being performed with adequate frequency, particularly in the case of a nuisance complaint investigation.

The commission does not agree with the request to include records of abatement system maintenance because the required abatement equipment, spraybars, requires little if any maintenance. Additionally, 30 TAC §116.615, General Conditions, requires that abatement equipment be in good condition and working properly at all times during normal facility operations.

BAQC requested the inclusion of a requirement that trucks entering or leaving the facility be required to cover their load to prevent particulate emissions from the trucks.

The TCEQ's jurisdiction is established by the Legislature and is limited to the issues set forth in statute. Accordingly, the TCEQ does not have statutory authority over the emissions from mobile sources. However, the Texas Department of Transportation has regulations regarding the covering of open truck beds and trailers.

BAQC commented that compliance history should be a consideration in authorization of these facilities and should be considered grounds for revoking an authorization.

Condition (1)(G) specifies that a registration for this standard permit is subject to a compliance history review and an applicant classified as a poor performer will not be granted authorization under this standard permit. In addition, if after authorization is granted, the facility is found to be out of compliance with the terms and conditions of the standard permit, it will be subject to possible enforcement action.

Jobe commented that the introductory paragraph states that the permit authorizes crushing operations and should be changed to crushing facilities in order to be consistent with the requirements of the TCAA and Chapter 116.

The commission agrees with the comment and has changed the language in the opening paragraph.

Jobe commented that it appeared that the standard permit could be used to authorize multiple crushers on a single site as long as the distance requirements in condition (1)(B), (3)(B), (3)(C), and (3)(D) were all met.

The commission agrees with this comment with some exceptions. Multiple crushers on a single site may be authorized by the standard permit as long as all of the conditions of the standard permit are met, including condition (3)(G), which requires that all crushers on the site (not including secondary crushers used as part of a single crushing operation) not exceed an aggregate of 2,640 hours. No changes were made to the standard permit.

Jobe, TACA, and WE commented that the 200 tons per hour (tph) limit was too low and should be increased to between 270 tph and 350 tph, possibly using a tiered system similar to that used in the Air Quality Standard Permit for Hot Mix Asphalt Plants. AGC suggested a tiered approach with a maximum throughput of 1,000 tph. Additionally, AGC and Jobe provided information demonstrating the increased economic efficiency of higher throughput rates.

No changes were made to the standard permit. This standard permit is intended to replace the current PBR for rock crushers and the intent is to provide authorization for a similar type and size operation. This standard permit is not meant to provide authorization for all unit configurations or operating scenarios for rock crushers. Facilities that cannot meet the conditions of this standard permit may be authorized by a case-by-case NSR permit.

AGC suggested that condition (3)(F) include a tertiary crusher in addition to the primary and secondary crushers this standard permit authorizes.

This standard permit is intended to replace the current PBR for rock crushers and the intent is to provide authorization for a similar type and size operation. This standard permit is not meant to provide authorization for all unit configurations or operating scenarios for rock crushers. Facilities that cannot meet the conditions of this standard permit may be authorized by a case-by-case NSR permit.

Jobe requested clarification on the requirements in condition (1)(F). Specifically, Jobe asked, for a site that has a facility authorized by a case-by-case NSR permit, assuming all conditions of the standard permit were met, if the standard permit could be used to authorize an additional crusher on that site.

No change was made to the standard permit. If a facility, currently authorized under a case-by-case NSR permit, exists at the site prior to the application for this standard permit, an additional crusher may be allowed under this standard permit if all conditions of the standard permit can be met, i.e. distance limitations.

TACA and WE requested that the standard permit allow an exemption from the setback requirement of 550 feet from any other rock crusher, CBP, or HMAP in condition (3)(D) for any facility demonstrating, through air dispersion modeling, that there would be no adverse off-property impacts.

This standard permit is not subject to the level of review necessary to make a determination of protectiveness based on modeling of individual facilities. Facilities that cannot meet the conditions of this standard permit may be authorized by a case-by-case NSR permit.

HCPHES also requested that the TCEQ take speciated particulate matter ($PM_{2.5}$) studies conducted by the TCEQ at the Clinton monitor in Harris County and other studies of this kind into account for this standard permit. Additionally, HCPHES commented that the modeling report also states that, since there is no guidance from United States Environmental Protection Agency (EPA) concerning how to globally address $PM_{2.5}$ from on-site engines, off-site on-road engines, off-site off-road engines, and other $PM_{2.5}$ sources, the commission has directed staff to not include potential $PM_{2.5}$ emissions from the engines for this analysis. HCPHES disagrees with this assessment and believes that the TCEQ can develop its methodology to address these emissions from $PM_{2.5}$. HCPHES stated that without including all potential emissions in the modeling, the protectiveness review is flawed and whether the standard permit is protective of the applicable PM_{10} and $PM_{2.5}$ NAAQS is questionable.

The EPA has not completed the implementation of the $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS) for the NSR program. The EPA has provided interim guidance in a memorandum that the PM_{10} NAAQS will be the surrogate for demonstrating compliance with the $PM_{2.5}$ NAAQS, EPA memorandum from John S. Seitz, Director of the Office of Air Quality Planning & Standards, dated October 23, 1997.

The commission reaffirmed on November 15, 2006, in the case of KBDJ L.P. for Permit Number 55480, the TCEQ would continue to use PM_{10} as a surrogate for $PM_{2.5}$ until EPA fully implements the new $PM_{2.5}$ NAAQS for the NSR program.

HCPHES also commented that the modeling report states that a low-level fugitive scaling factor of 0.6 was applied to the modeled emission rates for the area sources and the rationale is that it is consistent with TCEQ guidance for these types of sources. HCPHES asked for a reasoned technical and scientific basis for using a multiplier factor of 0.6 for fugitive emissions, which in essence reduces emissions by 40% in the emission rate calculations.

In a March 6, 2002, memorandum available at *http://www.tceq.state.tx.us/assets/public/permitting/air/memos/modadjfact.pdf*, the TCEQ documented and provided supporting references that explain the motivation, development, and rationale related to the adjustment of predicted concentrations from low-level sources with little vertical momentum or buoyancy flux. The procedure on how to apply the adjustment factor, background documentation, explanation of the technical justifications used, derivation of the adjustment factor, and a listing of supporting documentation are included in the ten-page March 6, 2002, memorandum.

HCPHES noted that the TCEQ's compliance history does not include violations documented by a local government that is not under contract with the TCEQ as a local program and requested that TCEQ include HCPHES violation notices as part of the compliance history when determining the issuance of this standard permit.

The input for determining the compliance history follows a complex formula that includes data determined by agency policy and rules. More specifically, TCEQ rules at 30 TAC §60.1(6) limit compliance histories to the components specified in this chapter. The components include, among other things, any final enforcement orders, court judgments, consent decrees, and criminal convictions of this state and the federal government relating to compliance with applicable legal requirements under the jurisdiction of the commission or the EPA and to the extent readily available to the executive director, final enforcement orders, court judgments, and criminal convictions relating to violations of environmental laws of other states. The components do not include violations documented by a local government that is not under contract with the TCEQ as a local program. Therefore, this information will not be considered in the review process for this standard permit.

HCPHES commented that, due to population density and incompatible land use issues, the residents of Harris County are particularly negatively impacted from the operation of rock and concrete crushers in close proximity to residences and businesses. Also, HCPHES requested that written site approval from local air programs having jurisdiction be granted before crushing operations are authorized to begin at a site. Additionally, HCPHES requested 21 calendar days to respond to requests for comments from the TCEQ.

The TCEQ's jurisdiction is established by the Legislature and is limited to the issues set forth in statute. Accordingly, the TCEQ does not have jurisdiction to consider facility location choices made by an applicant when determining whether to approve or deny a permit application, unless state law imposes specific distance limitations that are enforceable by the TCEQ. Zoning, land use, and population density are therefore beyond the authority of the TCEQ for consideration when reviewing air quality standard permit registrations. The applicant must meet all distance requirements for protectiveness and state law (statutory distance limits) regardless of type and nature of receptors. In addition, the air quality standard permit does not negate or affect the responsibility of the applicant to comply with any additional local requirements.

The form and concept of the standard permit results in a standardized set of requirements and conditions for use such that a case-by-case site evaluation is unnecessary provided that the applicant qualifies under the terms of the permit. The standard permit requires that a copy of the registration application form be provided to the regional office and local program with jurisdiction. Thus, a local program will be provided notice of the pending standard permit use, and can make any reviews deemed necessary. However, as the standard permit contains all the necessary site conditions for approval, any further written site approvals are unnecessary.

HCPHES requested that the TCEQ require permanent rock and concrete crushers be subject to the contested case hearing requirements of 30 TAC Chapter 39, Subchapter H.

Under TCEQ rules regarding public notice and applicability of contested case hearings, there is no opportunity for a contested case hearing for standard permits issued under Chapter 116. Specifically, the public notice applicability and general provisions found at 30 TAC §39.403(c)(5) states "Notwithstanding subsection (b) of this section, Subchapters H - M of this chapter (referring to applicability, public notice requirements and contested case hearings for different types of applications) do not apply to the following actions and other applications where notice or opportunity for contested case hearings are otherwise not required by law: (5) applications under Chapter 116, Subchapter F of this title (relating to Standard Permits)" In addition, TCEQ rules at 30 TAC §55.101(g)(9) state: "Subchapters D - G of this chapter (referring to public comment, requests for reconsideration and requests for contested case hearings) do not apply to air quality standard permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification)." Therefore, facilities to be authorized under this standard permit will not be subject to contested case hearing requirements.

HCPHES requested that the TCEQ require a consistent distance limitation of 440 yards throughout the entire standard permit rather than 440 yards for concrete crushing and 1,000 feet for rock crushing. It is the position of the HCPHES that the consistent distance limitation of

440 yards for all crushing activities (rock and concrete) will provide for more straightforward compliance and improve environmental public health.

The commission agrees with this comment. The set back required by condition (3)(C) has been changed from 1,000 feet to 440 yards.

HCPHES suggested the inclusion of concrete crushers in the list of facilities subject to the 550-foot distance requirement in condition (3)(D).

The commission agrees with this comment and is including the term concrete crusher in condition (3)(D).

HCPHES commented that, since the proposed standard permit contains requirements to meet EPA test methods (TMs) 9 and 22 as contained in 40 Code of Federal Regulations (CFR) Part 60 and both test methods require adequate illumination to perform the tests correctly, the restriction on operating hour requirement in condition (3)(H) should be changed to one hour before official sunset to one hour after official sunrise.

Although EPA TMs 9 and 22 are appropriate tools for evaluating PM emissions and making a determination of compliance, it is unreasonable to expect all facilities that may emit PM or be subject to a PM standard to operate only during those periods when TMs 9 and 22 may be made. It is reasonable to expect that facilities complying with the conditions of the standard permit during periods when TMs 9 and 22 observations are appropriate to continue to do so during those short periods when there is not sufficient illumination to perform an observation.

HCPHES requested that the TCEQ require that all in-plant roads and operating areas be paved with a cohesive, hard surface that is capable of being vacuumed.

Observations and technical evaluation of available documentation show that, if properly maintained, the best management practices (BMPs) proposed in this standard permit adequately control dust from traffic areas. These BMPs include covering, watering, application of dust-suppressant chemicals, or paving and cleaning. Requiring all facilities to pave would be an unnecessary financial burden on crusher owners.

TACA commented that it appreciates the TCEQ's recognition of the problems created by the ability of unscrupulous operators to stack permits in an effort to continue operating at a fixed site. The operational requirements as stated in condition (3)(G) of the proposed standard permit perceivably close the loophole and prohibit operators from applying for additional standard permits to operate another rock crusher on the site once the 2,640 operational hours have been exhausted.

The commission appreciates the support from TACA on this issue.

AGC commented that the definition of residence in condition (1)(A)(iii) refers to a permanent dwelling.

The commission agrees with the comment and is making the change to condition (1)(A)(iii) of this standard permit.

HCPHES requested that condition (3)(I) (requirement for a runtime meter) also require that the runtime meter be operating during crushing operations.

The commission agrees with this comment and is including a requirement that the runtime meter be operating in condition (3)(I).

HCPHES requested that staff provide calculated emissions rates for each source and the methodologies used in calculating emission rates along with technical bases for assumptions. Additionally, HCPHES would like specific information on the methodology, assumptions, and calculations used for road emissions.

Methodologies used in calculating the emission rates are based on the information supplied by the EPA in its Compilation of Air Pollutant Emissions Factors (AP-42), Chapter 11.19.2, Crushed Stone Processing and Pulverized Mineral Processing, which was last updated in August 2004. The methodology and assumptions used for the evaluation were the same as is currently used for all NSR permits and were documented in the Rock Crushing Plants guidance document and as a spreadsheet on the TCEQ Web site.

An initial assessment of road emissions was completed using EPA AP-42, Chapter 13.2.2, Unpaved Roads, which was updated in October 2001. To evaluate emissions, a number of variables need to be defined, including average weight of vehicles on the roads, distance traveled on the roads, average vehicle capacity, etc. For a standard permit that could be used in various locations and situations, it was difficult to determine what value to place on each of the variables available that would satisfy the majority of interested parties. Thus, for this standard permit, the decision was made to control the road emissions in the same manner as all NSR permits that require BMPs. As in all NSR permits, additional stipulations were included to ensure that visible emissions from all in-plant roads did not leave the property for a period exceeding 30 seconds in duration in any six-minute period as determined using EPA TM 22.

Calculated emission rates for each source are given in the table below.

EMISSION SOURCES AND EMISSION RATES

Permanent Rock and Concrete Crushing Standard Permit

AIR CONTAMINANTS DATA

Emission Point No.	Source Name	Air Contaminant Name	Emission Rates lb/hr	TPY
2	Primary Crusher	PM	0.24	0.32
		PM_{10}	0.11	0.14
4	Secondary Crusher	PM	0.24	0.32
		PM_{10}	0.11	0.14
3	Screen No. 1	PM	0.44	0.58
		PM_{10}	0.15	0.20
5	Screen No. 2	PM	0.44	0.58
		PM_{10}	0.15	0.20
1, 10	Loading/Unloading Operations	PM	0.03	0.04
		PM_{10}	0.01	0.02
MHFUG	Material Handling	PM	0.07	0.10
		PM_{10}	0.02	0.03
SPFUG	Stockpiles	PM	-.--	0.52
		PM_{10}	-.--	0.26
GEN 1	250hp Engine/Generator 1	NO_X	7.75	10.23
		CO	1.67	2.20
		SO_2	0.51	0.68
		PM_{10}	0.55	0.73
		VOC	0.63	0.83
GEN 2	250hp Engine/Generator 2	NO_X	7.75	10.23
		CO	1.67	2.20
		SO_2	0.51	0.68
		PM_{10}	0.55	0.73
		VOC	0.63	0.83
GEN 3	500hp Engine/Generator	NO_X	15.50	20.46
		CO	3.34	4.41
		SO_2	1.03	1.35
		PM_{10}	1.10	1.45
		VOC	1.26	1.66

Comments on the amendments to the Air Quality Standard Permit for Temporary Rock and Concrete Crushers

CSA commented that the rock for a public works project may not be found within the project right of way (ROW) and requested that condition 3(H) be revised to allow a crusher for a public works project to operate outside the ROW.

Because this condition gives special consideration regarding time on site to facilities crushing material for a public works project, the facility should be located within the ROW of, or immediately adjacent to, the

project being serviced. Staff notes that condition (3)(H) allows the crusher to operate at a site that is contiguous to the ROW.

SCC commented that modeling does not support the stockpile height limitation in condition (1)(K) and that this restriction should be removed.

The stockpile height limitation is not the subject of any proposed changes or revisions and therefore this comment is beyond the scope of the proposed amendments.

BAQC commented that City of Houston personnel have repeatedly observed that few of the crushing operations consistently practice the full set of regulatory requirements necessary to reduce air emissions under the TCEQ permits program. This may result in nuisance conditions beyond the 440 yard set back requirement and BAQC requested that the setback be increased to 1,500 feet.

While this comment is beyond the scope of the proposed amendments, it is expected that owners or operators of facilities authorized under this standard permit comply with all of the conditions of the permit or be subject to potential enforcement action.

BAQC requested the inclusion of a requirement that trucks entering or leaving the facility be required to cover their load to prevent particulate emissions from the trucks.

This comment is beyond the scope of the proposed amendments. Additionally, the commission has no statutory authority over the emissions from mobile sources and the Texas Department of Transportation has regulations regarding the covering of open truck beds and trailers.

BAQC commented that compliance history should be a consideration in authorization of these facilities and should be considered grounds for revoking an authorization.

Condition (3)(G) specifies that a registration for this standard permit is subject to a compliance history review and an applicant classified as a poor performer will not be granted authorization under this standard permit. In addition, if after authorization is granted, the facility is found to be out of compliance with the terms and conditions of the standard permit, it will be subject to possible enforcement action.

HCPHES commented that it did not support the proposed change to condition (1)(E), which made the requirement consistent with BACT in that conveyors less than 300 feet long will not be required to have a cover.

The commission is not making a change based on this comment. The operation of conveyors less than 300 feet long without covers is consistent with current BACT for these facilities as required by the THSC. During the original protectiveness review for this standard permit, no reductions in the emissions calculations were taken for covering all conveyors. This protectiveness review determined that the 200-foot and 300-foot limits for Tier I and II crushers are protective in that off-property concentrations of particulate matter less than ten microns (PM_{10}) would not exceed established effects screening levels and would not result in exceedances of the national ambient air quality standard for PM_{10}.

BAQC and HCPHES requested that recordkeeping requirements include daily records of road cleaning activities and maintenance on abatement systems.

This comment is beyond the scope of the proposed amendments.

HCPHES requested that owners or operators of temporary crushing operations subject to the notification requirement in condition (2)(H) be required to notify local programs as well as the TCEQ regional office.

This comment is beyond the scope of the proposed amendments.

HCPHES commented that, due to population density and incompatible land use issues, the residents of Harris County are particularly negatively impacted from the operation of rock and concrete crushers in close proximity to residences and businesses. Also, HCPHES requested that written site approval from local air programs having jurisdiction be granted before crushing operations are authorized to begin at a site. Additionally, HCPHES requested 21 calendar days to respond to requests for comments from the TCEQ.

This comment is beyond the scope of the proposed amendments.

AGC commented that the definition of residence in condition (1)(A)(iii) refers to a permanent dwelling.

The commission agrees with the comment and is making the change to condition (1)(A)(iii) of this standard permit.

AGC requested to waive condition (1)(Q), which prohibits location of a rock crusher on a site with another crusher. AGC stated that, at a public works project, a secondary crusher may be needed.

This comment is beyond the scope of the proposed amendments; however, staff notes that condition (3)(D) allows a secondary crusher.

AGC commented that increased throughput for Tier II crushers would provide greater flexibility and requested increased rates of 350 tph and 450 tph in a tiered approach.

This comment is beyond the scope of the proposed amendments.

TRD-200803613
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: July 15, 2008

♦ ♦ ♦

Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 25, 2008**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 25, 2008**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the

AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: A & L Partners, LLC dba Hurst Food Mart; DOCKET NUMBER: 2006-1844-PST-E; TCEQ ID NUMBER: RN101539930; LOCATION: 1401 West Hurst Boulevard, Hurst, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline (station); RULES VIOLATED: 30 TAC §334.50(b)(1)(A), (2), (2)(A)(i)(III), and (d)(1)(B), and TWC, §26.3475(a) and (c)(1), by failing to monitor its underground storage tanks (USTs) for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); failing to accurately conduct manual or automatic monthly inventory control procedure for all USTs; failing to monitor the pressurized piping associated with the UST system in a manner designed to detect releases from any portion of the piping system; and failing to test the line leak detectors at least once per year for performance and operational reliability; 30 TAC §115.244(1) and (3), and Texas Health and Safety Code (THSC), §382.085(b), by failing to conduct daily and monthly inspections of the Stage II vapor recovery system; 30 TAC §115.248(1) and THSC, §382.085.(b), by failing to ensure that at least one station representative received training and instruction in the operation and maintenance of the Stage II vapor recovery system; 30 TAC §115.246(1) and (3) and THSC, §382.085(b), by failing to maintain all required Stage II records at the station and failing to make the records immediately available for review upon request by agency personnel; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to conduct the required annual and triennial testing to verify proper operation of the Stage II equipment; 30 TAC §115.242(3)(J) and (9), and THSC, §382.085(b), by failing to maintain all components of the Stage II vapor recovery system in proper operating condition as specified by the manufacturer and/or any applicable California Air Resources Board (CARB) Executive Order(s), and free of defects that would impair the effectiveness of the system; and 30 TAC §115.222(3) and §115.242(4), and THSC, §382.085(b), by failing to prevent the release of gasoline vapors from the Stage II vapor recovery system; PENALTY: $5,500; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Bilal Enterprises, Inc. dba 786 Truck Stop 1; DOCKET NUMBER: 2006-2033-PST-E; TCEQ ID NUMBER: RN101880607; LOCATION: 7122 Highway 59, Beasley, Fort Bend County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; and 30 TAC §334.22(a) and TWC, §5.702, by failing to pay outstanding UST fees for TCEQ Financial Account Number 0046217U for Fiscal Year 2006; PENALTY: $4,080; STAFF ATTORNEY: Mary E. Coleman, Litigation Division, MC R-4, (817) 588-5917; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(3) COMPANY: Fox Tree & Landscape Nursery, Inc. dba Mother Earth Landscape Materials; DOCKET NUMBER: 2007-1841-MLM-E; TCEQ ID NUMBER: RN104751177; LOCATION: 3037 Farm-to-Market Road 665, Petronila, Nueces County, Texas; TYPE OF FACILITY: composting, brush recycling, concrete recycling, and sand and select fill mining operation; RULES VIOLATED: 30 TAC §328.5(b) and §330.11(e), by failing to submit to the Executive Director at least 90 days prior to engaging in recycling activities a Notice of Intent (NOI) to operate a recycling facility, and failing to submit a form or forms describing the types of materials being accepted for recycling, any storage of materials prior to recycling, how the materials will be recycled, and updates or changes to information contained in the facility report within 90 days of the effective date of the change; 30 TAC §328.5(c)(1), by failing to provide a written cost estimate showing the cost of hiring a third party to close the facility; 30 TAC §328.5(d) and §37.921, by failing to establish and maintain financial assurance for closure of a municipal solid waste recycling facility; 30 TAC §328.5(h), by failing to have a fire prevention and suppression plan; TWC, §26.121(a), by failing to obtain authorization to discharge storm water associated with an industrial activity through an individual permit or Multi-Sector General Permit; TWC, §116.602(a)(2), by failing to comply with the conditions of the Standard Permit for a Tier II Portable Rock Crusher; and 30 TAC §106.146(2), by failing to comply with the conditions of the Permit by Rule, Registration Number 76846 for the Soil Stabilization Plant; PENALTY: $18,721; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(4) COMPANY: Jerry Dean Harris; DOCKET NUMBER: 2007-1312-AGR-E; TCEQ ID NUMBER: RN102956455; LOCATION: approximately three miles south of Rising Star on County Road 441, Brown County, Texas; TYPE OF FACILITY: concentrated animal feeding operation (CAFO); RULES VIOLATED: 30 TAC §321.33(a), by failing to obtain authorization to operate a CAFO through a CAFO general permit or an individual water quality permit; PENALTY: $2,000; STAFF ATTORNEY: Patrick Jackson, Litigation Division, MC 175, (512) 239-6501; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(5) COMPANY: Jose Ibarra; DOCKET NUMBER: 2007-1989-MLM-E; TCEQ ID NUMBER: RN105338818; LOCATION: 2288 Nina Avenue, Brownsville, Cameron County, Texas; TYPE OF FACILITY: property; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent unauthorized disposal of municipal solid waste; and 30 TAC §330.15(a)(1) and TWC, §26.121, by failing to prevent the unauthorized discharge of municipal solid waste into or adjacent to the water of the state; PENALTY: $2,000; STAFF ATTORNEY: Mary E. Coleman, Litigation Division, MC R-4, (817) 588-5917; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(6) COMPANY: Mason Ready Mix, Inc.; DOCKET NUMBER: 2005-0779-WQ-E; TCEQ ID NUMBER: RN103138731; LOCATION: 1451 Landfill Road in Mason, Mason County, Texas; TYPE OF FACILITY: concrete production facility; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations (CFR) §122.26(a), by failing to obtain authorization to discharge storm water associated with industrial activity to water in the state through an individual industrial waste water permit or a Texas Pollutant Discharge Elimination System (TPDES) General Permit; PENALTY: $6,000; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(7) COMPANY: Red River Service Corporation; DOCKET NUMBER: 2008-0269-MSW-E; TCEQ ID NUMBER: RN104893631; LOCATION: 36861 FM 2480, Los Fresnos, Cameron County, Texas; TYPE OF FACILITY: registered recycling facility (Registration Number 100129) as well as a non-permitted municipal solid waste site; RULES VIOLATED: 30 TAC §328.5(f)(1), by failing to maintain records and documentation concerning limitations on storage of recyclable materials, source separation of materials received, and incidental non-recyclable waste; 30 TAC §328.5(h), by failing to have a fire prevention and suppression plan; and 30 TAC §330.7(a)

and §330.103(b), by failing to prevent the unauthorized storage of municipal solid waste, and failing to ensure that all municipal solid waste collected is unloaded at facilities authorized to accept the waste; PENALTY: $9,000; STAFF ATTORNEY: Kari Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(8) COMPANY: San Antonio Disposal Interests, L.P. dba Target Brush and Grinding, LLC; DOCKET NUMBER: 2007-0679-MSW-E; TCEQ ID NUMBER: RN103760864; LOCATION: 24111 United States Highway 281 South in San Antonio, Bexar County, Texas; TYPE OF FACILITY: brush mulching operation; RULES VIOLATED: 30 TAC §328.5(b), by failing to notify the TCEQ prior to the commencement of new mulching and recycling operations; PENALTY: $3,060; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(9) COMPANY: T S Ranch & Retreat, Inc.; DOCKET NUMBER: 2007-1360-PWS-E; TCEQ ID NUMBER: RN104810619; LOCATION: 5950 Farm-to-Market Road 920, Weatherford, Parker County, Texas; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.41(c)(3)(K), by failing to seal the wellhead with a gasket or a pliable, crack-resistant caulking compound and failing to cover the casing vent of the well with a 16-mesh or finer corrosion-resistant screening material; 30 TAC §290.42(l), by failing to compile and maintain an up-to-date Facility operations manual for operator review and reference; 30 TAC §290.43(c), by failing to maintain, design, fabricate, and erect, test and disinfect all facilities for potable water storage in strict accordance with American Water Works Association (AWWA) standards; 30 TAC §290.41(c)(3)(M), by failing to provide a suitable sampling cock on the well discharge line prior to treatment; 30 TAC §290.45(d)(2)(A)(ii) and THSC, §41.0315(c), by failing to provide minimum pressure tank capacity of 220 gallons; 30 TAC §290.46(d)(2)(A), by failing to maintain a free chlorine residual of 0.2 milligrams per liter (mg/L) throughout the distribution system at all times; 30 TAC §290.46(m)(1)(A), by failing to inspect the ground storage tank annually; 30 TAC §290.46(m)(1)(B), by failing to inspect the pressure tank annually; 30 TAC §290.121(a), by failing to maintain an up-to-date chemical and microbiological monitoring plan for the water system; 30 TAC §290.110(c)(5)(A), by failing to monitor the disinfectant residual at representative locations throughout the distribution system at least once every seven days; 30 TAC §290.46(f)(3)(A)(ii) and (E)(i), by failing to maintain records of water works operation and maintenance activities; and 30 TAC §290.39(e), by failing to submit plans and specifications for the water system that have been prepared by a licensed, professional engineer for commission review and approval; PENALTY: $3,350; STAFF ATTORNEY: Mary R. Risner, Litigation Division, MC 175, (512) 239-6224; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: Thunderbird Bay Water Services, Inc. dba Thunderbird Point Water System; DOCKET NUMBER: 2005-0546-PWS-E; TCEQ ID NUMBER: RN102686185; LOCATION: 1.3 miles east of Farm-to-Market Road 1520 and County Road 2318 in the Thunderbird Subdivision, Camp County, Texas; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.45(b)(1)(C)(iv) and THSC, §341.0315(c), by failing to have elevated storage capacity of 100 gallons per connection or a pressure tank capacity of 20 gallons per connection; 30 TAC §290.42(1), by failing to compile and maintain a thorough plant operations manual for operator review and reference; and 30 TAC §290.43(c)(4), by failing to equip the standpipe with a liquid level indicator located at the tank site; PENALTY: $1,890; STAFF ATTORNEY: Becky Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

TRD-200803602
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 15, 2008

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 25, 2008**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 25, 2008**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Carol Bailey dba C&T Qunique Cleaners; DOCKET NUMBER: 2006-1146-DCL-E; TCEQ ID NUMBER: RN100879881; LOCATION: 3014 Callie Street, Houston, Harris County, Texas; TYPE OF FACILITY: dry cleaning facility; RULES VIOLATED: 30 TAC §337.11(e) and Texas Health and Safety Code (THSC), §374.102, by failing to renew the facility's registration by completing and submitting the required registration form to the TCEQ for a dry cleaning and/or drop station facility; PENALTY: $1,185; STAFF ATTORNEY: Jacquelyn Boutwell, Litigation Division, MC 175, (512) 239-5846; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(2) COMPANY: Frank Lewis dba Lewis Service and Sales; DOCKET NUMBER: 2005-0970-PST-E; TCEQ ID NUMBER: RN101804144;

LOCATION: 303 Highway 90 West, China, Jefferson County, Texas; TYPE OF FACILITY: gasoline station; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service the underground storage tank (UST) system, not later than 60 days after the prescribed upgrade implementation date; 30 TAC §334.54(d)(2), by failing to ensure that any residue from stored regulated substances which remained in the temporarily out of service UST system did not exceed a depth of 2.5 centimeters at the deepest point and did not exceed 0.3% by weight of the system at full capacity; 30 TAC §334.7(d)(3), by failing to provide an amended registration regarding USTs within 30 days from the date of the occurrence of the change or addition, or within 30 days of the date on which the owner or operator first became aware of the change or addition; 30 TAC §334.49(a) and TWC, §26.3475(d), by failing to provide proper corrosion protection for all USTs; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); and 30 TAC §334.22(a) and TWC, §5.702, by failing to pay outstanding UST fees for TCEQ Financial Account Number 0020347U for Fiscal Year 1988 through Fiscal Year 2005; PENALTY: $18,975; STAFF ATTORNEY: Dinniah M. Chahin, Litigation Division, MC 175, (512) 239-0617; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(3) COMPANY: Hank Cantu dba Hills of Texas Bulk Water; DOCKET NUMBER: 2007-1826-PWS-E; TCEQ ID NUMBER: RN103108452; LOCATION: 414 Gregg Drive, Spicewood, Burnet County, Texas; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.109(c)(2) and §290.122(c)(2) and THSC, §341.033(d), by failing to collect any routine water samples for bacteriological analysis for the months of December 2006, January - April and June - August 2007 and failed to post the public notice of failure to conduct these samples; PENALTY: $3,640; STAFF ATTORNEY: Patrick Jackson, Litigation Division, MC 175, (512) 239-6501; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(4) COMPANY: IZR Corporation dba Garland Fina; DOCKET NUMBER: 2007-0409-PST-E; TCEQ ID NUMBER: RN101551299; LOCATION: 3101 Saturn Road, Garland, Dallas County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.45(c)(3)(A), by failing to install an emergency shutoff valve on each pressurized delivery or product line and ensure that it is securely anchored at the base of the dispenser; 30 TAC §115.242(3)(A)(i) and THSC, §382.085(b), by failing to provide and maintain the Stage II vapor recovery system in proper operating condition; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify the proper operation of the Stage II equipment; 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one facility representative receives training and instruction in the operation and maintenance of the Stage II vapor recovery system; 30 TAC §115.244(1) and (3) and THSC, §382.085(b), by failing to conduct daily and monthly inspections of the Stage II vapor recovery system; 30 TAC §115.246(7)(A) and THSC, §382.085(b), by failing to maintain records on-site and then make them immediately available for review; 30 TAC §334.8(c)(5)(B)(ii) and TWC, §26.346(a), by failing to renew a delivery certificate; PENALTY: $11,102; STAFF ATTORNEY: Becky Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: Socorro Alvarado; DOCKET NUMBER: 2007-0254-PST-E; TCEQ ID NUMBER: RN101775518; LOCATION: 301 East Austin Street, Kermit, Winkler County, Texas; TYPE OF FACILITY: USTs; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, three USTs for which any applicable component of the system is not brought into timely compliance with upgrade requirements; PENALTY: $7,875; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: Midland Regional Office, 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(6) COMPANY: Stoneridge Custom Homes, Inc.; DOCKET NUMBER: 2007-1682-WQ-E; TCEQ ID NUMBER: RN105348981; LOCATION: a lot near the corner of Delaware and Chesapeake in the Twin Creeks Estates Phase IV, Mansfield, Tarrant County, Texas; TYPE OF FACILITY: construction site for a residential housing development; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations (CFR) §122.26(c), by failing to develop and implement a storm water pollution prevention plan (SWP3) and obtain permit coverage to discharge storm water at the site; PENALTY: $4,000; STAFF ATTORNEY: Patrick Jackson, Litigation Division, MC 175, (512) 239-6501; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(7) COMPANY: William M. James; DOCKET NUMBER: 2007-1744-PST-E; TCEQ ID NUMBER: RN101562858; LOCATION: 123 East Crockett Street, Gordon, Palo Pinto County, Texas; TYPE OF FACILITY: owner-owned property with two inactive USTs; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, two USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; and 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the USTs within 30 days of the occurrence of the change or addition; PENALTY: $6,300; STAFF ATTORNEY: Tracy Chandler, Litigation Division, MC 175, (512) 239-0629; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(8) COMPANY: Wilmer Powell; DOCKET NUMBER: 2007-0981-MLM-E; TCEQ ID NUMBER: RN102997939; LOCATION: 196 Dunaway Drive, Trinity, Trinity County, Texas; TYPE OF FACILITY: unauthorized municipal solid waste transfer station; RULES VIOLATED: 30 TAC §111.201 and THSC, §382.085(b), by failing to comply with the prohibition on outdoor burning; and 30 TAC §330.11(g) and §330.5, by failing to notify the TCEQ of the intended operation of a low-volume transfer station; PENALTY: $3,150; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

TRD-200803603
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 15, 2008

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Notice of Opportunity to Comment on Shut Down/Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (commission) staff is providing an opportunity for written public comment on the listed

Shutdown/Default Order (S/DO). Texas Water Code (TWC), §26.3475 authorizes the commission to order the shutdown of any underground storage tank (UST) system found to be noncompliant with release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection regulations of the commission, until such time as the owner/operator brings the UST system into compliance with those regulations. The commission proposes a Shutdown Order after the owner or operator of a UST facility fails to perform required corrective actions within 30 days after receiving notice of the release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection violations documented at the facility. The commission proposes a Default Order when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. In accordance with TWC, §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 25, 2008**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a S/DO if a comment discloses facts or considerations that indicate that consent to the proposed S/DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed S/DO is not required to be published if those changes are made in response to written comments.

A copy of the proposed S/DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the S/DO shall be sent to the attorney designated for the S/DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 25, 2008**. Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission attorneys are available to discuss the S/DO and/or the comment procedure at the listed phone number; however, comments on the S/DO shall be submitted to the commission in **writing**.

(1) COMPANY: Almeda, Inc. dba Downtown Tiger Mart; DOCKET NUMBER: 2006-1727-PST-E; TCEQ ID NUMBER: RN102532081; LOCATION: 2111 Fannin Street, Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline (facility); RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks (USTs); 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor USTs for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring); 30 TAC §334.50(d)(1)(B)(iii)(I) and TWC, §26.3475(c)(1), by failing to record inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum substances as a motor fuel; 30 TAC §334.8(c)(5)(B)(ii), by failing to timely renew a previously issued TCEQ delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date of the delivery certificate; 30 TAC §334.8(c)(5)(A)(i), by failing to make available to a common carrier a valid, current, TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs at the facility; PENALTY: $55,080; STAFF ATTORNEY: Jacquelyn Boutwell, Litigation Division, MC 175, (512) 239-5846; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

TRD-200803601
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 15, 2008

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 299

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed repeals and additions to 30 Texas Administrative Code (TAC) Chapter 299, Dams and Reservoirs.

The proposed rulemaking would repeal the existing rules. The proposed rules relate to dam: design; construction plans and specifications; construction; operation and maintenance; inspections; removal; emergency management; and site security. The proposed rules update existing criteria to make them more consistent with current engineering practices. The proposed rules add requirements for emergency action plans, gate operating plans, security plans, and better defines the dam owner responsibilities. The proposed rules require new dams to meet certain design standards and requires additional nonstructural requirements of existing dams.

A public hearing on this proposal will be held in Austin on August 19, 2008, at 10:00 a.m. at the Texas Commission on Environmental Quality complex at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments. Registration begins 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. A time limit may be established to assure enough time is allowed for every interested person to speak. There will be no open discussion during the hearing; however, commission staff members will be available for discussion 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons planning to attend the hearing, who have special communication or other accommodation needs, should contact Michael Parrish at (512) 239-2548. Requests should be made as far in advance as possible.

Comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments*. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2008-005-299-CE. The comment period closes August 25, 2008. To view ruless, please visit *http://www.tceq.state.tx.us/nav/ruless/propose_adopt.html*. For further information or questions concerning this proposal, please contact Warren Samuelson, Field Operations Support Division, at (512) 239-5195.

TRD-200803573

Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: July 11, 2008

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Notice of Water Quality Applications

The following notices were issued during the period of July 3, 2008 through July 10, 2008.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

AQUA DEVELOPMENT INC has applied to for a renewal of TPDES Permit No. WQ0014279001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 150,000 gallons per day. The facility is located approximately 1.10 miles north of the intersection of State Highway 288 and Farm-to-Market Road 1462 in Brazoria County, Texas.

BELLA VISTA DRIPPING LP has applied for a new permit, Proposed Permit No. WQ0014866001, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 25,000 gallons per day via public access subsurface drip irrigation system with a minimum area of 5.75 acres. The draft permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 23,000 gallons per day via public access subsurface drip irrigation system with a minimum area of 5.28 acres. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility will be located 2,080 feet west of Bell Springs Road (County Road 169) at a point approximately 2.5 miles north of the intersection of West Highway 290 and Bell Springs Road in the Bella Vista Subdivision in Hays County, Texas. The disposal areas will be located in multiple areas throughout the Bella Vista Subdivision, located approximately 2.2 miles north of the intersection of West Highway 290 and Bell Springs Road in Hays County, Texas.

BRAZORIA COUNTY MUNICIPAL UTILITY DISTRICT NO 29 has applied for a renewal of TPDES Permit No. WQ0014253001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 450,000 gallons per day. The facility is located approximately 1,200 feet southwest of the intersection of County Road 405 and State Highway 288 in Brazoria County, Texas.

BROWNSVILLE NAVIGATION DISTRICT which operates Fishing Harbor Wastewater Treatment Plant, a publicly owned treatment works which receives and treats domestic wastewater, bilge water, and wastewater from shrimp processing facilities has applied for a renewal of TPDES Permit No. WQ0002817000, which authorizes the discharge of treated domestic wastewater, shrimp processing wastewater, shrimp boat bilge water, and storm water at a daily average flow not to exceed 250,000 gallons per day via Outfall 001. The facility is located on the south side of State Highway 48, approximately 5.4 miles east of the intersection of State Highway 48 and Farm-to-Market Road 511, northeast of the City of Brownsville, Cameron County, Texas.

CITY OF CLYDE has applied for a renewal of TPDES Permit No. WQ0010149001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 593,000 gallons per day. The facility is located approximately 0.72 mile south of the intersection of Farm-to-Market Roads 18 and 2700 in Callahan County, Texas.

CITY OF HAWKINS P.O. Box 329, Hawkins, Texas 75765-0329, has applied for a renewal of Permit No. WQ0004546000, which authorizes the land application of sewage sludge for beneficial use. The current permit authorizes land application of sewage sludge for beneficial use on 20.996 acres. This permit will not authorize a discharge of pollutants into waters in the State. The land application site is located approximately 1,500 feet west of Farm-to-Market Road 14 at a point approximately 6,500 feet north of the intersection of U.S. Highway 80 and Farm-to-Market Road 14 in Wood County, Texas.

GALVESTON COUNTY FRESH WATER SUPPLY DISTRICT NO 6 has applied for a renewal of TPDES Permit No. WQ0010879001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 320,000 gallons per day. The facility is located on the eastern end of Wilson Point in West Bay in Galveston County, Texas.

GRAND MISSION MUNICIPAL UTILITY DISTRICT NO 1 has applied for a minor amendment to the Texas Pollutant Discharge Elimination System (TPDES) permit WQ0014231001 to authorize the discharge of treated domestic wastewater at an interim annual average flow not to exceed 1,600,000 gallons per day. The existing permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,000,000 gallons per day. The facility is located approximately 0.9 mile south and 0.5 mile west of the intersection of Farm-to-Market Road 1093 and Harlem Road in Fort Bend County, Texas.

PL PROPYLENE LLC which operates a petrochemical plant manufacturing ethylene, propylene, crude butadiene, and crude benzene (dripoline), has applied for a renewal of TPDES Permit No. WQ0000393000, which authorizes the discharge of process wastewater and utility wastewaters, hydrostatic test water, and storm water at a daily average flow not to exceed 1,500,000 gallons per day via Outfall 001; and storm water following first flush and incidental discharges of process wastewater, utility wastewater, and hydrostatic test water on an intermittent and flow variable basis via Outfall 002. The facility is located at 9822 La Porte Freeway in the City of Houston, Harris County, Texas.

NORTHWEST HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO 5 has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0011824003, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 800,000 gallons per day. The facility was previously permitted under TPDES Permit No. WQ0011824001 which expired February 01, 2008. The facility is located at 14950 Cypress Green Drive, approximately 0.5 mile east of the intersection of Spring Cypress Road and Telge Road in Harris County, Texas.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200803635
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: July 16, 2008

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Notice of Water Rights Applications

Notices issued July 9, 2008.

APPLICATION NO. 08-2319B; The City of Saint Jo, Applicant, P.O. Box 186, Saint Jo, Texas 76265, has applied for an amendment to Certificate of Adjudication No. 08-2319 to add industrial use to the authorized 330 acre-feet of water per year from the Elm Fork Trinity River, Trinity River Basin in Montague County. More information on the application and how to participate in the permitting process is given below. The application and fees were received on June 20, 2007. Additional information and fees were received on August 6, 2007, October 16, 2007, and May 9, 2008. The application was declared administratively complete and filed with the Office of the Chief Clerk on August 8, 2007. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 12239; Seminole Development Corporation, Applicant, 6504 Bridgepoint Parkway, Suite 200, Austin, Texas 78730, has applied for a Water Use Permit to construct and maintain a reservoir for in-place recreation purposes as part of a flood control structure on an unnamed tributary of Cottonwood Branch, Trinity River Basin in Denton County. More information on the application and how to participate in the permitting process is given below. The application and fees were received on July 25, 2007, and additional information and fees were received on September 28, 2007, December 7, 2007, January 25, 2008, and June 16, 2008. The application was declared administratively complete and filed with the Office of the Chief Clerk on January 30, 2008. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "I/we request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200803636
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: July 16, 2008

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Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality (commission) on July 15, 2008, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Chester Hermes; SOAH Docket No. 582-08-0163; TCEQ Docket No. 2007-0452-MSW-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Chester Hermes on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-200803637
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: July 16, 2008

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Texas Facilities Commission

Request for Proposals #303-8-11691-A

The Texas Facilities Commission (TFC), on behalf of the Department of Family and Protective Services (DFPS), announces the issuance of Request for Proposals (RFP) #303-8-11691-A. TFC seeks a ten (10) year lease of approximately 9,175 square feet of office space in Athens, Henderson County, Texas.

The deadline for questions is August 1, 2008; and the deadline for proposals is August 8, 2008 at 3:00 p.m. The award date is September 17, 2008. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=77805*.

TRD-200803611
Kay Molina
General Counsel
Texas Facilities Commission
Filed: July 15, 2008

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Texas Health and Human Services Commission

Correction of Amendment to the Women's Health Program

The Texas Health and Human Services Commission (HHSC) published a public notice regarding an amendment to the Women's Health Program (WHP) demonstration waiver in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5406). The notice incorrectly stated that HHSC was requesting an October 1, 2008, effective date. The correct notice should be as follows:

The Texas Health and Human Services Commission (HHSC) announces its intent to submit an amendment to the Women's Health Program (WHP) demonstration waiver, which is a Medicaid family planning waiver under the authority of §1115 of the Social Security Act. The proposed effective date of this amendment is November 1, 2008.

The WHP provides family planning services for uninsured women, ages 18 through 44, who are not otherwise eligible for Medicaid, the State Children's Health Insurance Program, or Medicare, and have a family income at or below 185 percent of the Federal Poverty Level. The waiver program is authorized under Human Resources Code §32.0248, which lists the general categories of services which may be covered under the program.

The waiver amendment proposes to include the following new benefits and procedure codes under the program:

1) One code for a new office client visit;

2) Two codes for the ultrasound exam of the abdomen (to locate a missing intrauterine device);

3) One code for the ultrasound of an extremity (to locate a missing implanted contraceptive rod in the arm, brand name Implanon);

4) Four new contraceptive method codes related to the implanted contraceptive rod, brand name Implanon;

5) Four new lab test codes: a) Thyroid Stimulating Hormone (to rule out thyroid problems when a woman has missed her period for several months), b) Three Herpes tests; and

6) Three codes related to Essure, a non-surgical sterilization method.

These specific benefits are allowable under the general categories of services provided under the current waiver and under Human Resources Code §32.0248. These additional benefits will make WHP coverage more similar to the family planning services offered through the Department of State Health Services family planning programs funded through Titles V and XX of the Social Security Act and Title X of the Public Health Service Act.

This amendment to the demonstration waiver will maintain budget neutrality for each year that the waiver is in effect. The waiver has been approved for a five-year period from 2007 through 2011.

To obtain copies of the waiver amendment, or to make comments on this waiver amendment, interested parties may contact Carmen Samilpa-Hernandez by mail at Health and Human Services Commission, P.O. Box 85200, H-620, Austin, Texas 78708-5200; by telephone at (512) 491-1128; by facsimile at (512) 491-1953; or by e-mail at carmen.samilpa-hernandez@hhsc.state.tx.us.

TRD-200803533
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: July 9, 2008

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Public Notice

The Texas Health and Human Services Commission (HHSC) intends to submit to the Centers for Medicare and Medicaid Services an amendment to the Integrated Care Management (ICM) 1915(c) waiver. The ICM waiver program is currently approved for the three year period beginning February 1, 2008, and ending January 31, 2011. The amendment is proposed to take effect on October 1, 2008.

The ICM waiver program offers eligible participants a wide variety of community-based services that support the participant remaining in the community. Services are offered in the participant's home, an adult foster care home, or a licensed assisted living facility. Services are delivered using both provider managed and participant-directed service delivery methods. Personal assistance services and respite are available using either the provider managed or participant-directed methods; other services are delivered using the provider-managed method.

The program operates in the Dallas and Fort Worth service areas. The Dallas service area consists of Collin, Dallas, Ellis, Hunt, Kaufman, Navarro, and Rockwell counties. The Tarrant service area consists of Denton, Hood, Johnson, Parker, Tarrant, and Wise counties.

In general, adults (age 21 and over) receiving Supplemental Security Income (SSI), adults who are considered SSI-related adults, and adults receiving medical assistance only are eligible to participate in the program unless identified as an excluded population. Individuals receiving SSI who are dually eligible for Medicaid and Medicare are eligible for the ICM program.

The amendment removes the prohibition on provision of "routine" dental services and allows the Texas Department of Aging and Disability Services to grant an exemption to the $5,000 annual dental service limit up to $10,000 annually.

HHSC is requesting that the waiver amendment be approved for the period beginning October 1, 2008, through January 31, 2011. This amendment maintains cost neutrality for waiver years 2008 through 2011.

To obtain copies of the proposed waiver amendment, interested parties may contact Carmen Samilpa-Hernandez by mail at Texas Health and Human Services Commission, P.O. Box 85200, mail code H-620, Austin, Texas 78708-5200, phone (512) 491-1128, fax (512) 491-1953, or by e-mail at carmen.samilpa-hernandez@hhsc.state.tx.us.

TRD-200803538
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: July 10, 2008

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Public Notice

The Texas Health and Human Services Commission (HHSC) announces its intent to submit an amendment to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendment is effective July 1, 2008.

The proposed amendment adds language to the state plan that identifies the HHSC website at which providers can access fee schedules and rates and adds a statement regarding the difference in fees and rates related to government providers and private providers. The proposed amendment is estimated to result in no additional annual expenditure.

To obtain copies of the proposed amendment or to submit written comments, interested parties may contact Carolyn Pratt, Rate Analyst, Rate Analysis Department, by mail at the Texas Health and Human Services

Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1175; by facsimile at (512) 491-1998; or by e-mail at carolyn.pratt@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200803543
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: July 11, 2008

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit an amendment to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendment is effective August 1, 2008, through July 31, 2009.

The proposed amendment will adjust payment rates for the Day Activity and Health Services programs to increase attendant compensation as necessary to comply with the new federal minimum wage that will increase $0.70 from the current $5.85 per hour to $6.55 per hour on July 24, 2008.

The proposed amendment is estimated to result in additional annual aggregate expenditures of $107,104 for a portion of federal fiscal year (FFY) 2008 (August 1, 2008, through September 30, 2008), with approximately $64,862 of additional costs in federal funds and approximately $42,242 of additional costs in state general revenue; and aggregate expenditures of $545,662 for a portion of FFY 2009 (October 1, 2008 through July 31, 2009), with approximately $324,341 of additional costs in federal funds and approximately $221,321 of additional costs in state general revenue.

To obtain copies of the proposed amendment or to submit written comments, interested parties may contact Sarah Hambrick by mail at Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, Mail Code H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1431; by facsimile at (512) 491-1998; or by e-mail at sarah.hambrick@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200803624
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: July 16, 2008

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit an amendment to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendment is effective August 1, 2008, through July 31, 2009.

The proposed amendment will adjust payment rates for the Primary Home Care program to increase attendant compensation as necessary to comply with the new federal minimum wage that will increase $0.70 from the current $5.85 per hour to $6.55 per hour on July 24, 2008.

The proposed amendment is estimated to result in additional annual aggregate expenditures of $10,205,063 for the remainder of federal fiscal year (FFY) 2008 (August 1, 2008, through September 30, 2008), with approximately $6,180,186 of additional costs in federal funds and approximately $4,024,877 of additional costs in state general revenue. The proposed amendment is estimated to result in additional aggregate expenditures of $52,372,847 for the applicable portion of FFY 2009 (October 1, 2008, through July 31, 2009), with approximately $31,130,420 of additional costs in federal funds and approximately $21,242,427 of additional costs in state general revenue.

To obtain copies of the proposed amendment or to submit written comments, interested parties may contact Sarah Hambrick by mail at Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, Mail Code H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1431; by facsimile at (512) 491-1998; or by e-mail at sarah.hambrick@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200803626
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: July 16, 2008

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Texas Higher Education Coordinating Board

Request for Proposals: Facilitation of Implementation of College Readiness Standards

PURPOSE: Section 61.0761 directs the P-16 Council to develop a P-16 College Readiness and Success Strategic Plan to "increase student success and decrease the number of students enrolling in developmental course work in institutions of higher education." This plan was approved by the P-16 Council in May 2007 and by the Texas Higher Education Coordinating Board (THECB) at its January 2008 meeting. Objective 5 of the plan calls for the THECB to "increase college readiness and a college going culture."

The THECB, an agency of the State of Texas, is requesting proposals from qualified applicants as outlined in this document. This Request for Proposals (hereinafter referred to as RFP) is being advertised pursuant to the Texas Government Code, Chapter 2254 et seq. (http://tlo2.tlc.state.tx.us/statutes/gv.toc.htm). Please read this entire RFP and submit your proposal in accordance with these instructions.

The purpose of this RFP is to solicit proposals from Qualified Applicants to accomplish the following projects:

1. Develop, implement and analyze a structured review process of Texas course syllabi, assignments, and student work of representative career and technical college courses to determine how thoroughly the Texas College Readiness Standards (CRS) are addressed. Upon completion of the analysis and the selection of representative courses, the awarded applicant will report to the Board and THECB staff.

2. Design, plan, and implement a series of 13 regional workshops to be completed no later than November 2008 to support the promotion and implementation of the CRS adopted by the Coordinating Board in January 2008 and the Commissioner of Education in April 2008.

The workshops must utilize the CRS as a framework for strengthening alignment between high schools and colleges in Texas. The design of the workshop structure and content must be developed in partnership with THECB staff as well as planning the logistical elements of the workshops, including locations and facilities, materials, facilitators, publicity, liaison roles, organizational elements, documentation and follow-up provisions, travel and lodging arrangements, and all other elements necessary to be prepared to offer the workshops.

The work covered in this proposal is related to services being provided to the THECB under an existing contract with the Educational Policy Improvement Center of Eugene, Oregon (EPIC). THECB intends to award the contract to EPIC unless a better offer is received.

AWARD OF CONTRACT: Contract will be negotiated with an entity that is selected from among the Applicants that are determined through the evaluation process to have a successful Proposal. Submission of a Proposal confers no rights of Applicant to an award or to a subsequent Contract, if there is one. The issuance of this RFP does not guarantee that a Contract will ever be awarded. THECB reserves the right to amend the terms and provisions of the RFP, negotiate with Applicant, add, delete, or modify the Contract and/or the terms of Proposal submitted, extend the deadline for submission of Proposal, or withdraw the RFP entirely for any reason solely at THECB's discretion. An individual Proposal may be rejected if it fails to meet any requirement of this RFP. THECB may seek clarification from Applicant at any time, and failure to respond within a reasonable time frame is cause for rejection of a Proposal.

INQUIRIES: All inquiries shall be directed to Laurie Frederick, Program Specialist, at Laurie.Frederick@thecb.state.tx.us. Applicant must not discuss a Proposal with any other THECB employee unless authorized by one of the Points of Contact. Questions must be submitted in writing and received no later than August 8, 2008 at 5:00 p.m. C.S.T. All responses by THECB must be in writing in order to be binding. Any information deemed by THECB to be important and of general interest or which modify requirements shall be sent to all recipients of the RFP in the form of an addendum.

CLOSING DATE: August 15, 2008

TRD-200803598
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: July 15, 2008

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Texas Department of Insurance

Company Licensing

Application to change the name of SCOR LIFE INSURANCE COMPANY to LONGEVITY INSURANCE COMPANY, a domestic life, accident and/or health company. The home office is in Plano, Texas.

Application to change the name of EXCESS REINSURANCE COMPANY to KNIGHTBROOK INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Wilmington, Delaware.

Application for incorporation to the State of Texas by GREEN HEDGES INSURANCE COMPANY, a domestic fire and/or casualty company. The home office is in Austin, Texas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200803633
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: July 16, 2008

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Texas Department of Licensing and Regulation

Vacancy on Advisory Board on Barbering

The Texas Department of Licensing and Regulation (Department) announces a vacancy on the Advisory Board on Barbering established by Texas Occupations Code, Chapter 1601. The pertinent rules may be found in 16 TAC §82.65. The purpose of the Advisory Board on Barbering is to advise the Texas Commission of Licensing and Regulation (Commission) and the Department on: education and curricula for applicants; the content of examinations; proposed rules and standards on technical issues related to barbering; and other issues affecting barbering.

The Board is composed of five members appointed by the presiding officer of the Commission, with the Commission's approval. The Board consists of two members who are engaged in the practice of barbering as a Class A barber and do not hold a barbershop permit; two members who are a barbershop owner and hold a barbershop permit; and one member who holds a permit to conduct or operate a barber school. Members serve staggered six-year terms, with the terms of one or two members expiring on the same date each odd-numbered year. This announcement is for one position of a Class A barber who does not hold a barbershop permit.

Interested persons should request an application from the Texas Department of Licensing and Regulation by telephone (512) 463-6599, fax (512) 475-2874 or e-mail advisory.boards@license.state.tx.us. Applications may also be downloaded from the Department's website at: www.license.state.tx.us.

Applicants may be asked to appear for an interview; however any required travel for an interview would be at the applicant's expense.

TRD-200803605
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: July 15, 2008

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Vacancies on Board of Boiler Rules

The Texas Department of Licensing and Regulation (Department) announces two vacancies on the Board of Boiler Rules established by Texas Health and Safety Code, Chapter 755. The pertinent rules may be found in 16 TAC §65.65. The purpose of the Board of Boiler Rules is to advise the Texas Commission of Licensing and Regulation (Commission) in the adoption of definitions and rules relating to the safe construction, installation, inspection, operating limits, alteration, and repair of boilers and their appurtenances.

The Board is composed of nine members appointed by the presiding officer of the Commission, with the Commission's approval. The Board consists of three members representing persons who own or use boilers in this state; three members representing companies that insure boilers in this state; one member representing boiler manufacturers or installers; one member representing organizations that repair or alter boilers in this state; and one member representing a labor union. Members serve staggered six-year terms, with the terms of three members expiring January 31 of each odd-numbered year. This announcement is for the positions of a manufacturer or installer of boilers in this state, and a member representing companies that insure boilers in this state.

Interested persons should request an application from the Texas Department of Licensing and Regulation by telephone (512) 475-4765, fax (512) 475-2874 or e-mail advisory.boards@license.state.tx.us. Applications may also be downloaded from the Department's website at: www.license.state.tx.us.

Applicants may be asked to appear for an interview; however any required travel for an interview would be at the applicant's expense.

TRD-200803606
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: July 15, 2008

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Vacancies on Elevator Advisory Board

The Texas Department of Licensing and Regulation (Department) announces eight vacancies on the Elevator Advisory Board established by Texas Health and Safety Code, Chapter 754. The pertinent rules may be found in 16 TAC §74.65. The purpose of the Elevator Advisory Board is to advise the Texas Commission of Licensing and Regulation (Commission) on the adoption of appropriate standards for the installation, alteration, operation and inspection of equipment; the status of equipment used by the public in this state; sources of information relating to equipment safety; public awareness programs related to elevator safety, including programs for sellers and buyers of single-family dwellings with elevators, chairlifts, or platform lifts; and any other matter considered relevant by the Commission.

The Board is composed of nine members appointed by the presiding officer of the Commission, with the Commission's approval. The Board consists of a representative of the insurance industry or a certified elevator inspector; a representative of equipment constructors; a representative of owners or managers of a building having fewer than six stories and having equipment; a representative of owners or managers of a building having six stories or more and having equipment; a representative of independent equipment maintenance companies; a representative of equipment manufacturers; a licensed or registered engineer or architect; a public member; and a public member with a physical disability. Members serve at the will of the Commission. This announcement is for the following positions: a representative of equipment constructors; a representative of owners or managers of a building having fewer than six stories and having equipment; a representative of owners or managers of a building having six stories or more and having equipment; a representative of independent equipment maintenance companies; a representative of equipment manufacturers a licensed or registered engineer or architect; a public member; and a public member with a physical disability.

Interested persons should request an application from the Texas Department of Licensing and Regulation by telephone (512) 475-4765, fax (512) 475-2874 or e-mail advisory.boards@license.state.tx.us. Applications may also be downloaded from the Department's website at: www.license.state.tx.us. Applicants may be asked to appear for an interview, however any required travel for an interview would be at the applicant's expense.

TRD-200803609
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: July 15, 2008

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Vacancies on Licensed Court Interpreter Advisory Board

The Texas Department of Licensing and Regulation (Department) announces four vacancies on the Licensed Court Interpreter Advisory Board established by Texas Government Code, Chapter 57. The purpose of the Licensed Court Interpreter Advisory Board is to advise the Texas Commission of Licensing and Regulation (Commission) in adopting rules and designing a licensing examination.

The Board is composed of nine members appointed by the presiding officer of the Commission, with the Commission's approval. The Board consists of an active district, county, or statutory county court judge who has been a judge for at least the three years preceding the date of appointment; an active court administrator who has been a court administrator for at least the three years preceding the date of appointment; an active attorney who has been a practicing member of the state bar for at least the three years preceding the date of appointment; three active licensed court interpreters; and three public members who are residents of this state. Members serve staggered six-year terms with the terms of one third of the members expiring on February 1, of each odd numbered year. This announcement is for following positions: two active licensed court interpreters; and two public members who are residents of this state.

Interested persons should request an application from the Texas Department of Licensing and Regulation by telephone (512) 475-4765, fax (512) 475-2874 or e-mail advisory.boards@license.state.tx.us. Applications may also be downloaded from the Department's website at: www.license.state.tx.us.

Applicants may be asked to appear for an interview; however any required travel for an interview would be at the applicant's expense.

TRD-200803607
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: July 15, 2008

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Vacancies on Medical Advisory Committee

The Texas Department of Licensing and Regulation (Department) announces two vacancies on the Medical Advisory Committee established by Texas Occupations Code, Chapter 2052. The pertinent rules may be found in 16 TAC §61.120. The purpose of the Medical Advisory Committee is to advise the Texas Commission of Licensing and Regulation (Commission) on health issues for boxing event contestants including physical tests for contestants and registration requirements for ringside physicians.

The Committee is composed of seven members appointed by the presiding officer of the Commission, with the Commission's approval. The Committee consists of four medical doctors licensed by the State of Texas; one emergency medical technician; and two public members. Members serve at the will of the Commission. This announcement is for two medical doctors licensed by the State of Texas.

Interested persons should request an application from the Texas Department of Licensing and Regulation by telephone (512) 475-4765, fax (512) 475-2874 or e-mail advisory.boards@license.state.tx.us. Applications may also be downloaded from the Department's website at: www.license.state.tx.us.

Applicants may be asked to appear for an interview; however any required travel for an interview would be at the applicant's expense.

TRD-200803608
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: July 15, 2008

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Texas Lottery Commission

Instant Game Number 1085 "King Tut's Treasures"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1085 is "KING TUT'S TREASURES". The play style is "maze coordinate".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1085 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1085.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: BAR SYMBOL, EYE SYMBOL, SNAKE SYMBOL, LION SYMBOL, ANKH SYMBOL, CAT SYMBOL, CAMEL SYMBOL, PYRAMID SYMBOL, A2, A3, A4, A5, A6, B1, B2, B3, B4, B5, B6, C1, C2, C3, C4, C5, C6, D1, D2, D3, D4, D5, D6, E1, E2, E3, E4, E5, E6, F1, F2, F3, F4, F5 and F6.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1085 - 1.2D

PLAY SYMBOL	CAPTION
BAR SYMBOL	BAR
EYE SYMBOL	EYE
SNAKE SYMBOL	SNAKE
LION SYMBOL	LION
ANKH SYMBOL	ANKH
CAT SYMBOL	CAT
CAMEL SYMBOL	CAMEL
PYRAMID SYMBOL	GAME OVER
A2	
A3	
A4	
A5	
A6	
B1	
B2	
B3	
B4	
B5	
B6	
C1	
C2	
C3	
C4	
C5	
C6	
D1	
D2	
D3	
D4	
D5	
D6	
E1	
E2	
E3	
E4	
E5	
E6	
F1	
F2	
F3	
F4	
F5	
F6	

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00 or $100.

H. High-Tier Prize - A prize of $1,000 or $50,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1085), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 75 within each pack. The format will be: 1085-0000001-001.

K. Pack - A pack of "KING TUT'S TREASURES" Instant Game tickets contains 75 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "KING TUT'S TREASURES" Instant Game No. 1085 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule, §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "KING TUT'S TREASURES" Instant Game is determined once the latex on the ticket is scratched off to expose 36 (thirty-six) Play Symbols. A player must only scratch one box at a time. The player must scratch the box labeled START HERE first. The player must then follow the instructions in each GO TO coordinate revealed and continue until the "pyramid" symbol appears. If the player matched 3 symbols in the revealed boxes, the player wins the prize shown in the legend. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 36 (thirty-six) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 36 (thirty-six) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 36 (thirty-six) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 36 (thirty-six) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. The starting position will always be A1.

C. There will be either two or three of each GO TO LEGEND play symbol on each ticket, excluding the GAME OVER play symbol.

D. There will be exactly one GAME OVER play symbol on each ticket.

E. There will be no more than six non-symbol squares opened scratched consecutively.

F. There will be a minimum of nineteen and a maximum of twenty-five squares revealed on a ticket.

G. The final winning space will be opened no more than seven spaces before the GAME OVER play symbol.

H. The GAME OVER play symbol may appear on any coordinate with the exception of the A1 square.

I. There will be no duplicate GO TO play symbols on a ticket regardless if it has a legend symbol or not.

2.3 Procedure for Claiming Prizes.

A. To claim a "KING TUT'S TREASURES" Instant Game prize of $5.00, $10.00, $20.00, $50.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $50.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "KING TUT'S TREASURES" Instant Game prize of $1,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "KING TUT'S TREASURES" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "KING TUT'S TREASURES" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "KING TUT'S TREASURES" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code, §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players

whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,040,000 tickets in the Instant Game No. 1085. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1085 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	403,200	12.50
$10	537,600	9.38
$20	168,000	30.00
$50	45,318	111.21
$100	17,178	293.40
$1,000	2,100	2,400.00
$50,000	6	840,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.30. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1085 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1085, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200803537

Kimberly L. Kiplin

General Counsel

Texas Lottery Commission

Filed: July 10, 2008

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Instant Game Number 1104 "Jumbo Bucks II"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1104 is "JUMBO BUCKS II". The play style is "key number match with doubler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1104 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 1104.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, JUMBO SYMBOL, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $200, $2,000 and $20,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1104 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
JUMBO SYMBOL	WINX2
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$200	TWO HUND
$2,000	TWO THOU
$20,000	20 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00 or $200.

H. High-Tier Prize - A prize of $2,000 or $20,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1104), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1104-0000001-001.

K. Pack - A pack of "JUMBO BUCKS II" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). One ticket will be folded over to expose a front and back of one ticket on each pack. Please note the books will be in an A, B, C and D configuration.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery

pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "JUMBO BUCKS II" Instant Game No. 1104 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule, §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "JUMBO BUCKS II" Instant Game is determined once the latex on the ticket is scratched off to expose 22 (twenty-two) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to either SERIAL NUMBER play symbol, the player wins PRIZE shown for that number. If a player reveals a "JUMBO" play symbol, the player wins DOUBLE the PRIZE shown for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 22 (twenty-two) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 22 (twenty-two) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 22 (twenty-two) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 22 (twenty-two) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. The "JUMBO" (doubler) play symbol will only appear on intended winning tickets and only as dictated by the prize structure.

C. No more than two (2) matching non-winning prize symbols will appear on a ticket.

D. No duplicate SERIAL NUMBERS play symbols on a ticket.

E. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

F. Non-winning prize symbols will never be the same as the winning prize symbol(s).

G. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

H. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "JUMBO BUCKS II" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, or $200, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $50.00 or $200 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly.

A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "JUMBO BUCKS II" Instant Game prize of $2,000 or $20,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "JUMBO BUCKS II" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "JUMBO BUCKS II" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "JUMBO BUCKS II" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code, §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 8,040,000 tickets in the Instant Game No. 1104. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1104 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$2	643,200	12.50
$4	739,680	10.87
$5	96,480	83.33
$10	112,560	71.43
$20	48,240	166.67
$50	38,592	208.33
$200	6,499	1,237.11
$2,000	31	259,354.84
$20,000	17	472,941.18

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.77. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1104 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1104, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200803590

Kimberly L. Kiplin

General Counsel

Texas Lottery Commission

Filed: July 14, 2008

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Instant Game Number 1105 "Giant Jumbo Bucks II"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1105 is "GIANT JUMBO BUCKS II". The play style is "key number match with auto win (5X)".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1105 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1105.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, JUMBO SYMBOL, $5.00, $10.00, $15.00, $20.00, $25.00, $40.00, $50.00, $100, $500, $1,000 and $50,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1105 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
JUMBO SYMBOL	WINX5
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$25.00	TWY FIV

$40.00	FORTY
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$50,000	50 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $5.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100 or $500.

H. High-Tier Prize - A prize of $1,000, $5,000 or $50,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1105), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1105-0000001-001.

K. Pack - A pack of "GIANT JUMBO BUCKS II" Instant Game tickets contains 75 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "GIANT JUMBO BUCKS II" Instant Game No. 1105 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "GIANT JUMBO BUCKS II" Instant Game is determined once the latex on the ticket is scratched off to expose 44 (forty-four) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any SERIAL NUMBER play symbol, the player wins PRIZE shown for that number. If a player reveals a "JUMBO" play symbol, the player wins 5 TIMES the PRIZE shown for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 44 (forty-four) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 44 (forty-four) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 44 (forty-four) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 44 (forty four) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. The "JUMBO" (win x 5) play symbol will only appear on intended winning tickets and only as dictated by the prize structure.

C. No more than three (3) matching non-winning prize symbols will appear on a ticket.

D. No duplicate SERIAL NUMBERS play symbols on a ticket.

E. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

F. Non-winning prize symbols will never be the same as the winning prize symbol(s).

G. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

H. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "GIANT JUMBO BUCKS II" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "GIANT JUMBO BUCKS II" Instant Game prize of $1,000, $5,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "GIANT JUMBO BUCKS II" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "GIANT JUMBO BUCKS II" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "GIANT JUMBO BUCKS II" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not

claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 1105. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1105 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	480,000	12.50
$10	640,000	9.38
$15	180,000	33.33
$20	160,000	37.50
$50	80,000	75.00
$100	6,900	869.57
$500	750	8,000.00
$1,000	150	40,000.00
$5,000	17	352,941.18
$50,000	8	750,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.88. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1105 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1105, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200803591
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: July 14, 2008

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Instant Game Number 1106 "Mega Jumbo Bucks II"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1106 is "MEGA JUMBO BUCKS II". The play style is "key number match with auto win (10X)".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1106 shall be $10.00 per ticket.

1.2 Definitions in Instant Game No. 1106.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for

dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, JUMBO SYMBOL, $10.00, $20.00, $50.00, $100, $200, $500, $1,000, $2,500 and $100,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1106 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
JUMBO SYMBOL	WINX10
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$200	TWO HUND

$500	FIV HUND
$1,000	ONE THOU
$2,500	25 HUND
$100,000	HUN THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100, $200 or $500.

H. High-Tier Prize - A prize of $1,000, $2,500 or $100,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1106), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 050 within each pack. The format will be: 1106-0000001-001.

K. Pack - A pack of "MEGA JUMBO BUCKS II" Instant Game tickets contains 050 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 050 while the other fold will show the back of 001 and front 050.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "MEGA JUMBO BUCKS II" Instant Game No. 1106 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule, §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "MEGA JUMBO BUCKS II" Instant Game is determined once the latex on the ticket is scratched off to expose 54 (fifty-four) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any SERIAL NUMBER play symbol, the player wins PRIZE shown for that number. If a player reveals a "JUMBO" play symbol, the player wins 10 TIMES the PRIZE shown for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 54 (fifty-four) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 54 (fifty-four) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 54 (fifty-four) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 54 (fifty-four) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. The "JUMBO" (win x 10) play symbol will only appear on intended winning tickets and only as dictated by the prize structure.

C. No more than four (4) duplicate non-winning prize symbols will appear on a ticket.

D. No duplicate SERIAL NUMBERS play symbols on a ticket.

E. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

F. Non-winning prize symbols will never be the same as the winning prize symbol(s).

G. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 10 and $10).

H. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "MEGA JUMBO BUCKS II" Instant Game prize of $10.00, $20.00, $50.00, $100, $200, or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $50.00, $100, $200 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "MEGA JUMBO BUCKS II" Instant Game prize of $1,000, $2,500 or $100,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "MEGA JUMBO BUCKS II" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "MEGA JUMBO BUCKS II" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "MEGA JUMBO BUCKS II" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code, §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game

ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 3,000,000 tickets in the Instant Game No. 1106. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1106 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$10	240,000	12.50
$20	450,000	6.67
$50	60,000	50.00
$100	42,875	69.97
$200	6,500	461.54
$500	975	3,076.92
$1,000	100	30,000.00
$2,500	50	60,000.00
$100,000	3	1,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.75. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1106 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1106, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200803592
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: July 14, 2008

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Texas Department of Public Safety

Consultant Services Award

In accordance with §2254.030 of the Texas Government Code, the Texas Department of Public Safety (TXDPS) announces the award of the contract pursuant to Request for Qualifications to Study the Management and Organizational Structure of the Texas Department of Public Safety (RFQ #405-HQ8-9081), which was published in the May 16, 2008, issue of the *Texas Register* (33 TexReg 4038).

A description of the work to be performed under the contract:

Deloitte Consulting LLP will provide TXDPS with an independent, top-down study of TXDPS to optimize performance, improve quality, promote the effective and efficient use of resources, and assist in the identification of future resource needs. The deadline for the final written report is September 29, 2008. Deloitte Consulting LLP will present the final written report at the October meeting of the Public Safety Commission.

Name and business address of the consultant selected:

Deloitte Consulting LLP 111 S. Wacker Drive Chicago, IL 60606

The amount of the contract:

$950,752.00

Beginning and ending dates of the contract:

The contract became effective July 11, 2008.

The contract expires 120 days after Deloitte Consulting LLP makes its presentation at the Texas Public Safety Commission meeting in October or at the next monthly meeting if the October meeting is cancelled. Upon mutual agreement between the parties and approval by the appropriate state entities, the parties may renew the contract up to one year in one or more monthly increments.

Date for completion of work to be performed:

The final written report is due by 3:00 p.m. on September 29, 2008. Deloitte Consulting LLP must present the final written report at the Texas Public Safety Commission meeting in October or at the next monthly meeting if the October meeting is cancelled.

TRD-200803632
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Filed: July 16, 2008

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Public Utility Commission of Texas

Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on July 7, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Marcus Cable Associates, L.L.C. d/b/a Charter Communications for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 35852 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the City of Corinth, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 35852.

TRD-200803544
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 11, 2008

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Notice of Application for Amendment to Certificated Service Area Boundary

Notice is given to the public of an application filed on July 9, 2008, with the Public Utility Commission of Texas for an amendment to a certificated service area boundary in Fort Bend County, Texas.

Docket Style and Number: Application of AT&T Texas to Amend Certificate of Convenience and Necessity to Modify the Service Area Boundaries of the Valley Lodge and Richmond-Rosenberg Exchanges. Docket Number 35858.

The Application: The minor boundary amendment is being filed to transfer a small portion, which includes Cross Creek Ranch development, from AT&T's Valley Lodge exchange to the Richmond-Rosenberg exchange. The proposed amendment will allow AT&T to more efficiently provide service in the area.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by August 1, 2008, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) at 1-800-735-2989. All comments should reference Docket Number 35858.

TRD-200803547
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 11, 2008

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Notice of Application for Amendment to Certificated Service Area Boundary

Notice is given to the public of an application filed on July 11, 2008, with the Public Utility Commission of Texas for an amendment to a certificated service area boundary in Collin County, Texas.

Docket Style and Number: Application of AT&T Texas to Amend Certificate of Convenience and Necessity to Modify the Service Area Boundaries of McKinney and Prosper Exchanges. Docket Number 35866.

The Application: This minor boundary amendment is being filed to realign the boundary between AT&T's McKinney and Prosper exchanges to create more clearly-defined physical boundaries using major roads between the two exchanges.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by August 1, 2008, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 35866.

TRD-200803616
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 15, 2008

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Notice of Application for Sale, Transfer, or Merger

Notice is given to the public of a joint application for sale, transfer, or merger filed with the Public Utility Commission of Texas on July 9, 2008, pursuant to the Public Utility Regulatory Act, TEXAS UTILITY CODE ANNOTATED §14.101 and §37.154 (Vernon 2007 & Supplemental 2007) (PURA).

Docket Style and Number: Joint Application of AEP Texas Central Company and Electric Transmission Texas to Transfer Certificate Rights and for Approval of Transfer of Facilities in Kenedy County, Docket Number 35859.

The Application: This transaction involves the transfer of facilities from AEP Texas Central Company (AEP TCC) to Electric Transmission Texas (ETT). The transmission facilities proposed for transfer are the new (under construction) 345-kV double-circuit capable transmis-

sion line in Kenedy County, the associated Ajo Switching Station, Zorillo Switching Station, the Sarita Switching Station site, and the associated certificate of convenience and necessity rights for the transmission facilities as follows: The line will originate at the site of the AEP TCC Ajo Switching Station located in Kenedy County on the privately owned Kenedy Ranch east of U.S. Highway 77 approximately 9 miles south of the community of Sarita and approximately 11.5 miles north of the community of Armstrong. The line will terminate at two new switching stations named Sarita and Zorillo also located in Kenedy County to the east on the privately owned Kenedy Ranch. The Sarita Switching Station will be located more than 17.4 miles southeast of Sarita and the Zorillo Switching Station will be located more than 13.2 miles northeast of Armstrong. The line will be approximately 21.6 miles in length with single pole steel structures with double circuit capability. The easements associated with the portion of the transmission facility will also be transferred to ETT.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Docket Number 35859.

TRD-200803546
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 11, 2008

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Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on July 7, 2008, for waiver of denial by the Pooling Administrator (PA) of Southwestern Bell Telephone Company d/b/a AT&T Texas' request for two thousand-blocks of numbers on behalf of its customer, Medieval Times Dinner & Tournament, in the 972 NPA, in the Allen rate center.

Docket Title and Number: Petition of Southwestern Bell Telephone Company d/b/a AT&T Texas for Waiver of Denial of Numbering Resources, Docket Number 35853.

The Application: Southwestern Bell Telephone Company submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because Southwestern Bell Telephone Company d/b/a AT&T Texas did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than July 30, 2008. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35853.

TRD-200803545
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 11, 2008

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Notice of ERCOT's Filing for Approval of Unaffiliated Directors

Notice is hereby given to the public of the July 11, 2008, filing with the Public Utility Commission of Texas (commission) of the Petition of the Electric Reliability Council of Texas, Inc. (ERCOT) for Approval of Unaffiliated Directors.

Docket Style and Number: Petition of the Electric Reliability Council of Texas, Inc. for Approval of Unaffiliated Directors, Docket Number 35862.

The Application: ERCOT seeks approval of Unaffiliated Directors of the ERCOT Board. Pursuant to ERCOT bylaws, ERCOT's Corporate Members have approved the selection of the Unaffiliated Directors. ERCOT's Nominating Committee unanimously selected Alton D. Patton as an Unaffiliated Director and re-elected Miguel Espinosa of the ERCOT Board. The Unaffiliated Directors will serve pending commission consideration and approval.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or 1-800-735-2989. All correspondence should refer to Docket Number 35862.

TRD-200803615
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 15, 2008

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Notice of Intent to Implement Minor Rate Changes Pursuant to P.U.C. Substantive Rule §26.171

Notice is given to the public of Livingston Telephone Company, Inc. (Livingston Telephone) application filed with the Public Utility Commission of Texas (commission) on July 14, 2008, for approval of a minor rate change pursuant to P.U.C. Substantive Rule §26.171.

Tariff Control Title and Number: Statement of Intent by Livingston Telephone Company, Inc. to Implement a Minor Rate Change Pursuant to Substantive Rule §26.171; Tariff Control Number 35877.

The Application: Livingston Telephone filed an application to implement a minor rate change to the Local Exchange Access Line Rates for residence and business customers, the business Rotary Key Trunk and PBX Trunk rates, the primary, secondary and line connection service charges, and the rural four-party access lines per route mile charge. The Company also proposes to remove the two-party access line rate and the rural two-party access line per route mile charge from its Customer Services Tariff. The proposed effective date for the proposed rate changes is November 1, 2008. The estimated annual revenue increase recognized by Livingston Telephone is $108,122 or less than 5% of Livingston Telephone's gross annual intrastate revenues. Livingston Telephone has 7,120 access lines (residence and business) in service in the state of Texas.

If the commission receives a complaint(s) relating to this application signed by the lesser of 5% or 1,500 of the affected local service customers to which this application applies by October 1, 2008, the application will be docketed. The 5% limitation will be calculated based

upon the total number of customers of record as of the calendar month preceding the commission's receipt of the complaint(s).

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by October 1, 2008. Requests to intervene should be filed with the commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission at (512) 936-7120 or toll-free 1-800-735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Tariff Control Number 35877.

TRD-200803617
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 15, 2008

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Notice of Petition for Emergency Rulemaking

On July 11, 2008, Texas Legal Services Center (TLSC) and Texas Ratepayers' Organization to Save Energy (Texas ROSE) (Petitioners) filed a Petition for Emergency Rulemaking to Temporarily Waive Deposit Requirements and Switching Fees under P.U.C. SUBST. R. §§25.43, 25.474, and 25.478 for Low-Income Customers of Defaulting Retail Electric Providers (REPs).

The proposed rule amendments would temporarily suspend current credit and deposit requirements and fees related to switching to allow low-income residential consumers whose electric providers have gone out of business or otherwise stopped serving them to be able to select another provider without having to pay a security deposit or any fees related to switching, including the out-of-cycle meter reading charge. The Petitioners assert that the confluence of high fuel prices, high temperatures and customers being involuntarily transferred to POLR service has created an imminent peril to the public health, safety, and welfare.

Notice of this petition for rulemaking will be published in the July 25, 2008, issue of the *Texas Register.* Under P.U.C. PROC. R. §22.281(a)(2), comments on the petition are due on August 15, 2008, 21 days after the date of publication of notice in the *Texas Register.* The Commission will, however, consider and possibly act on this petition at its next open meeting, currently scheduled for July 31, 2008.

Comments on the petition (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 21 days after the publication of this notice. All comments should refer to Project Number 35868.

To obtain further information interested persons may contact Mick Long, Attorney by phone at (512) 936-7294 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll-free 1-800-735-2989. All correspondence should refer to Project Number 35868.

TRD-200803639
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 16, 2008

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Office of Rural Community Affairs

Request for Proposals for the Rural Technology Center Grant Program

Executive Committee for Office of Rural Community Affairs

Summary: The Office of Rural Community Affairs announces the issuance of a Request for Proposals (RFP) for the Rural Technology Center Grant Program (Program). The proposal requirements are contained in the RFP which may be obtained at http://www.orca.state.tx.us/ and http://esbd.cpa.state.tx.us/. The purpose of the Program is to award grants to public institutions of higher education, public high schools, and governmental entities located in a rural county for the development and operation of Rural Technology Centers that provide community access to technology; computer literacy programs; educational programs designed to provide concurrent enrollment credit for high school students taking postsecondary courses in information and emerging technologies; training for careers in technology-related fields and other highly skilled industries; and technology related continuing and adult education programs. The goal of the Program is to increase community access to technology and promote computer literacy. Centers will provide resources to prepare residents, including high school students, for careers in applied technology and other skilled industries. In accordance with the General Appropriations Act, funding of applications for the 2008-2009 Biennium is limited to public institutions of higher education, public high schools, and governmental entities in Starr and Zapata counties. The RFP may be viewed and printed from the Internet on http://www.orca.state.tx.us/ and http://esbd.cpa.state.tx.us/.

Due Date: An original and six copies of a written proposal are due to the Office of Rural Community Affairs no later than 4:00 p.m. August 25, 2008. No proposals will be accepted after this deadline. Proposals may be sent or hand carried to:

Office of Rural Community Affairs

Mail: P.O. Box 12877, Austin, Texas 78711

By hand: 1700 North Congress Avenue, Suite 220, Austin, Texas 78701

Attention: Executive Director

Potential respondents may pose written questions concerning this RFP by e-mail. Contact Charles S. (Charlie) Stone, Executive Director, at cstone@orca.state.tx.us until 12:00 Noon, August 22, 2008. The contact person for this RFP is Charles S. (Charlie) Stone at (512) 936-6704.

TRD-200803614
Charles S. Stone
Executive Director
Office of Rural Community Affairs
Filed: July 15, 2008

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Texas Department of Transportation

Public Hearing Notice - Statewide Public Involvement Plan

The Texas Department of Transportation (department) will hold a public hearing on Friday, August 29, 2008, at 11:00 a.m. at the Texas Department of Transportation, 200 East Riverside Drive, Room 2A-2, Austin, Texas to receive public comments on the Statewide Public Involvement Plan (PIP). The PIP reflects the department's documented public involvement process for providing reasonable public access to technical and policy information used in the development of the long-range statewide transportation plan and Statewide Transportation Improvement Program (STIP). The PIP includes the Transportation Planning and Programming (TPP) Division's process and those of the department's districts as provided to TPP.

Title 23, Code of Federal Regulations, §450.210 requires that the State's public involvement process establish continuous public involvement opportunities, provide reasonable public access to technical and policy information used in the development of the long-range statewide transportation plan and STIP, and provide adequate public notice of public involvement activities and time for public review and comment at key decision points.

A copy of the proposed Statewide PIP will be available for review, at the time the notice of hearing is published, at each of the department's district offices, at the department's Transportation Planning and Programming Division offices located in Building 118, Second Floor, 118 East Riverside Drive, Austin, Texas, and on the department's website at www.txdot.gov.

Persons wishing to review the Statewide PIP may do so online or by contacting the Transportation Planning and Programming Division at (512) 486-5033.

Persons wishing to speak at the hearing may register in advance by notifying Lori Morel, Transportation Planning and Programming Division, at (512) 486-5033 not later than Thursday, August 28, 2008, or they may register at the hearing location beginning at 10:00 a.m. on the day of the hearing. Speakers will be taken in the order registered. Any interested person may appear and offer comments or testimony, either orally or in writing; however, questioning of witnesses will be reserved exclusively to the presiding authority as may be necessary to ensure a complete record. While any persons with pertinent comments or testimony will be granted an opportunity to present them during the course of the hearing, the presiding authority reserves the right to restrict testimony in terms of time or repetitive content. Groups, organizations, or associations should be represented by only one speaker. Speakers are requested to refrain from repeating previously presented testimony. Persons with disabilities who have special communication or accommodation needs or who plan to attend the hearing may contact Randall Dillard, Government and Public Affairs Division, at 125 East 11th Street, Austin, Texas 78701-2483, (512) 305-9137. Requests should be made no later than three days prior to the hearing. Every reasonable effort will be made to accommodate the needs.

Further information on the Statewide PIP may be obtained from Lori Morel, Transportation Planning and Programming Division, 118 East Riverside Drive, Austin, Texas 78704, (512) 486-5033. Interested parties who are unable to attend the hearing may submit comments to James L. Randall, P.E., Director, Transportation Planning and Programming Division, 118 East Riverside Drive, Austin, Texas 78704. In order to be considered, all written comments must be received at the Transportation Planning and Programming office by Friday, September 12, 2008, at 4:00 p.m.

TRD-200803634
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: July 16, 2008

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Texas Water Development Board

Request for Applications for Grants under the FEMA Severe Repetitive Loss Program

The Texas Water Development Board (Board), as administrator of the Severe Repetitive Loss (SRL) Program on behalf of the Federal Emergency Management Agency (FEMA), requests the submission of applications leading to the possible award of SRL Program Grants from communities within the State with the legal authority to mitigate the impacts of flooding and which participate in the National Flood Insurance Program (NFIP), in accordance with FEMA policy and regulations set forth in Title 44 of the Code of Federal Regulations (CFR) Part 79 (44 CFR 79). A community is defined as: (a) a political subdivision, including any Indian tribe or authorized native organization, that has zoning and building code jurisdiction over a particular area having special flood hazards, and which is participating in the NFIP, or (b) a political subdivision or other authority that is designated to develop and administer a mitigation plan by political subdivisions, all of which meet the requirements of (a). Eligible applicants from any area of the state may submit applications for SRL Program Grants. Eligible applicants for SRL Program Grants must have a FEMA approved Hazard Mitigation Action Plan.

Description of SRL Program Purpose and Objectives.

The purpose of the SRL Program is to reduce or eliminate the risk of flood damage to severe repetitive loss residential structures insured under the NFIP. An SRL property is defined by FEMA as a residential property that is covered under an NFIP flood insurance policy and: (a) has at least four NFIP claim payments (including building and contents) of over $5,000 each, and the cumulative amount of such claims exceeding $20,000; or (b) at least two separate claims (building payments only, excluding claims for contents losses) with cumulative claims exceeding the market value of the structure. For both (a) and (b), at least two of the referenced claims must have occurred within any ten-year period and must be greater than ten days apart. The long-term goal of the SRL Program is to reduce or eliminate claims under the NFIP. The SRL Program will provide funding assistance for eligible flood mitigation projects which will result in the greatest savings to the National Flood Insurance Fund in the shortest period of time, based on a Benefit-Cost Ratio using FEMA approved methodology to conduct the Benefit-Cost Analysis.

Description of Funding Considerations.

The SRL Program is subject to the availability of federal funding, as well as any directive or restriction made with respect to such funds. The available state wide allocated amount for Federal Fiscal Year 2009 is expected to be about $5,000,000. These grants all require a 10 percent local match, of which any part or all may be in the form of in-kind services. There are no award limits or project limits associated with grant requests for the SRL Program.

Consultation with the Property Owner.

The consultation process is a required notification and information gathering process which is conducted by the applicant prior to the submittal of the application. The applicant will consult with the property owner on project activity types, estimated costs, and insurance implications, as well as, the property owner's right to appeal. The applicant should be clear to the property owner that the consultation does not represent a formal offer of mitigation assistance. In addition, as part of the consultation process, each interested property owner should sign documentation of Notice of Voluntary Participation which will be provided by the applicant as part of the application submittal.

Deadline, Review Criteria and Contact Person for Additional Information.

Following the consultation process, the applicant is required to submit applications electronically through FEMA's web-based Electronic Grants Management System (e-Grants). Applicants must request access into the e-Grants system. Access requests should be directed to Mr. Gilbert Ward at (512) 463-6418, or by e-mail to gilbert.ward@twdb.state.tx.us. Deadline for submitting applications to the Board for SRL Program Grant funds is 5:00 p.m., October 16, 2008. Applications will be evaluated according to fed-

eral rules and guidance. For additional information concerning the SRL Program, current program guidance, and links to federal rules, go to www.fema.gov/government/grant/srl/index . For additional information on FEMA's e-grant system, go to www.fema.gov/government/grant/egrants . Final awards for grant funding will be as approved by FEMA.

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Kenneth L. Petersen
General Counsel
Texas Water Development Board
Filed: July 15, 2008

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Request for Applications for Planning and Project Grants under the FEMA Flood Mitigation Assistance Program

The Texas Water Development Board (Board), as administrator of the Flood Mitigation Assistance (FMA) Program on behalf of the Federal Emergency Management Agency (FEMA), requests the submission of applications leading to the possible award of FMA Planning Grants and Project Grants from communities within the State with the legal authority to plan for and mitigate the impacts of flooding, and which participate in the National Flood Insurance Program (NFIP), in accordance with FEMA policy and regulations set forth in Title 44 of the Code of Federal Regulations (CFR) Part 79 (44 CFR 79). A community is defined as (a) a political subdivision, including any Indian tribe or authorized native organization, that has zoning and building code jurisdiction over a particular area having special flood hazards, and which is participating in the NFIP, or (b) a political subdivision or other authority that is designated to develop and administer a mitigation plan by political subdivisions, all of which meet the requirements of (a). Eligible applicants from any area of the State may submit applications for FMA Program Planning and Project grants. Eligible applicants for FMA Project Grants must have a FEMA approved Mitigation Action Plan.

Description of FMA Program Purpose and Objectives.

The purpose of the FMA Program is to provide Planning and Project grants to develop or update Flood Mitigation Plans for their planning area, and for implementing flood mitigation projects. The overall goal of the program is to fund cost-effective measures that reduce or eliminate the long-term risk of flood damage to buildings, manufactured homes, and other NFIP-insurable structures. Specific goals include reducing the number of repetitively or substantially damaged structures and associated claims under the NFIP and encouraging long-term comprehensive mitigation planning.

Description of Funding Considerations.

The available allocated amounts for Federal Fiscal Year 2009 are expected to be $250,000 for Planning Grants and $2,500,000 for Project Grants. These grants all require a 25 percent local match, of which not more than one-half (12.5 percent) may be in the form of in-kind services. No award for a Planning Grant may exceed $50,000, and no single community may receive more than one Planning Grant per 5-year period. In addition, there is a $3,300,000 limit for the total amount of Project Grant funds to any single community over a five-year period.

Deadline, Review Criteria and Contact Person for Additional Information.

It is required that applications be submitted electronically through FEMA's web-based Electronic Grants Management System (e-Grants). Applicants must request access into the e-Grants system. Access requests should be directed to Mr. Gilbert Ward at (512) 463-6418, or by e-mail to gilbert.ward@twdb.state.tx.us. Deadline for submitting applications to the Board for FMA Planning and/or Project Grant funds is 5:00 p.m., October 16, 2008. Applications will be evaluated according to rules provided in 31 TAC Chapter 368, see http://info.sos.state.tx.us/pls/pub/readtac$ext.viewtac (Title 31, Part 10). For additional information on the FMA Program, go to www.fema.gov/government/grant/fma/index . Go to www.fema.gov/government/grant/egrants for additional information on FEMA's e-grant system. Final awards for grant funding will be as approved by FEMA.

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Kenneth L. Petersen
General Counsel
Texas Water Development Board
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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).